

SOTHO LAW AND CUSTOM IN BASUTOLAND

T. G. Ian Hamnett

Ph.D. University of Edinburgh 1970



C O N T E N T S

	pp.
Abstract of Thesis	1
Introduction	4
Chapter One: Customary Law	37
Excursus: Custom and the Courts	57
Chapter Two: The Public Law of Chieftainship and Succession	73
Chapter Three: Chiefs and Courts	122
Chapter Four: Chieftainship—Administration and Jurisdiction	145
Chapter Five: Chiefs, People and the Land	172
Excursus: Land Shortage in Basutoland	228
Chapter Six: The Law of Private Succession and Inheritance	249
Chapter Seven/	

cont...

pp.

Chapter Seven: Conclusion--Political, Administrative and Executive	290
Notes to Text	328
Appendix One: Some Footnotes on Kinship and Marriage	396
Appendix Two: The Dispute over the Chieftainship of Patlong	409
Appendix Three: Kinship and Affinity in the Higher Chieftainship	450
References	457

Bristol, 25th September 1970.

I hereby declare that the accompanying thesis entitled "Sotho Law and Custom in Basutoland" has been composed by myself and is my own work.

T. G. Ian Hamnett

University of Bristol
Department of Sociology
Bristol.

SOTHO LAW AND CUSTOM IN BASUTOLAND

Abstract of Thesis:-

Introduction. Basutoland (now Lesotho) is a small land-locked nation of about 900,000 inhabitants, mainly Sotho in origin and Sotho-speaking, with an internal economy that is partly pastoral and partly agricultural, supplemented by large-scale labour migration to South Africa.

Field work was conducted for eleven months in 1964 and three months in 1966, being divided between the systematic study of court records and a period of research in a village in the arable lowlands.

Chapter I. Customary law can be defined as a set of norms which the actors in a social situation abstract from practice and invest with moral authority. The term "custom" is misleading. The concept of "social control" has positivist implications that distract attention from the specificity of the social experience of law.

Excursus. The Roman-Dutch courts in Basutoland tend on the whole to impose common-law doctrines of custom. The Basotho courts adopt a pragmatic view, which cannot be deduced from their terminology.

Chapter II. The Paramount Chief and most of the twenty-two principal chiefs are descended from the four senior sons of Moshoeshoe I, founder of the nation. The dominant Koena lineage achieved national control partly by intermarriage, partly by the system of "placing" sons as chiefs. Succession passes in the male line, but problems of ranking arise since seniority can be assessed either by reference to descent from Moshoeshoe or by proximity to the reigning Paramount Chief.

Chapter III. The traditional ethic of chieftainship has lost its actuarial but retained its moral expectations. Social change has presented it with some familiar problems. The judicial courts are now separated from the chiefs, who however retain administrative rights and can hold courts of arbitration.

Chapter IV. Chiefly jurisdiction is in principle territorial, but various anomalies complicate its operation. The relative positions of principal chiefs, lower chiefs and headmen present problems of administration and furnish occasions of dispute.

Chapter V. Subjects receive various land rights from the chiefs. Land is not an inheritance, but succession gives certain legitimate expectations to heirs. The tension between the two principles is central to the traditional system but has been obscured by recent practice in the judicial courts.

Excursus. In spite of Sheddick's arguments to the contrary, there is a serious land shortage in Basutoland.

Chapter VI. Cattle and other moveables are inheritable, but "ownership" (in itself a problematic concept) inheres in the agnatic family. Matters of inheritance are for the family council. The mutual rights of widows and heirs are a major source of difficulty, both practically and analytically.

Chapter VII. The concepts of power and authority are a starting point for the analysis of law and are plausible for most western systems; but the Basutoland evidence shows that they are inadequate in a customary context in so far as they imply a polarity of "judicial" and "administrative" which obscures the nature of the "executive law" that is the characteristic legality of chieftainship.

Appendix I. Affinal terminology can be structured in terms of the distinction between siblings of like and unlike sex.

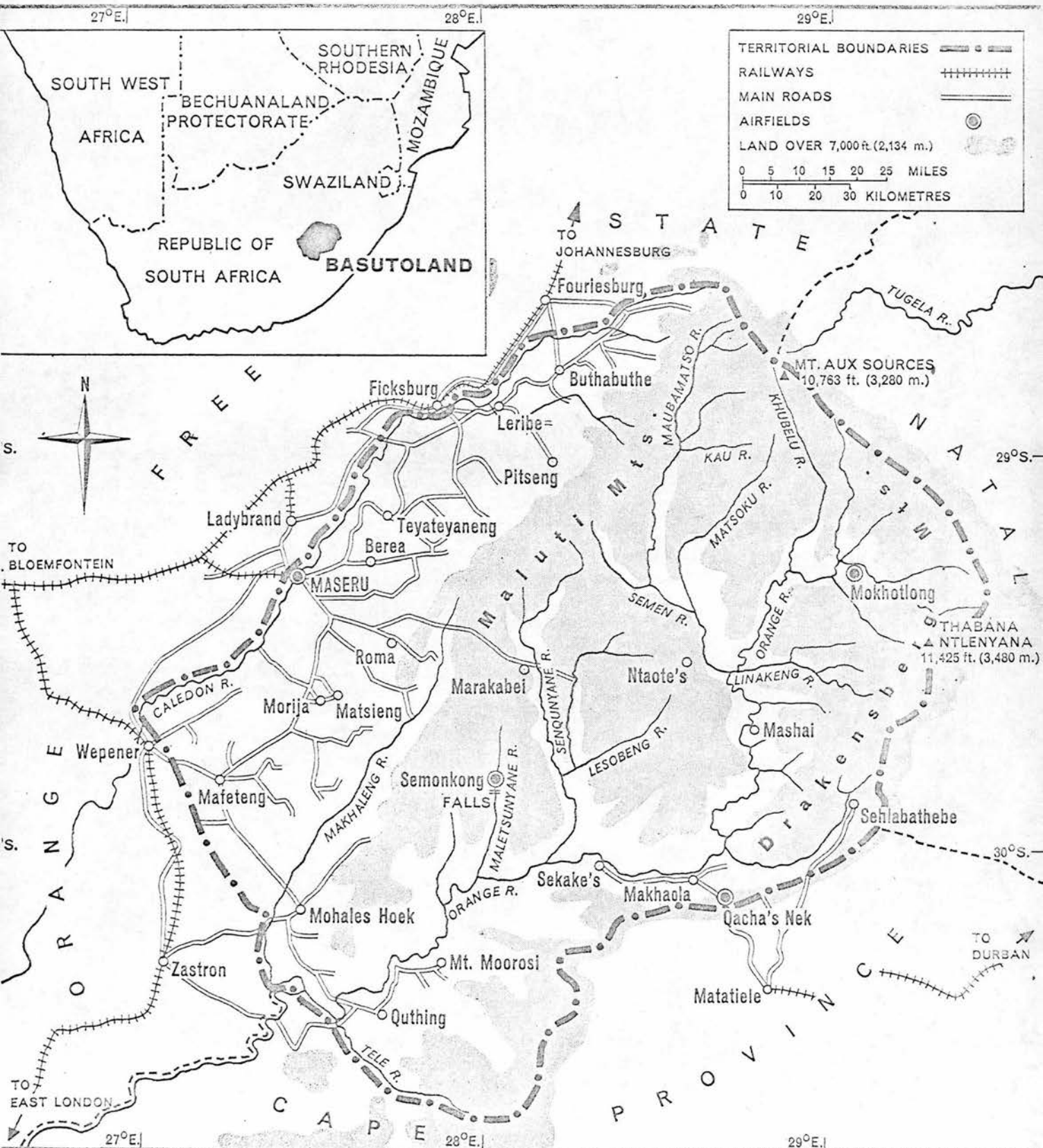
Appendix II. The dispute over the Patlong chieftainship illustrates many issues of succession, legitimacy, inheritance and chieftainship, reveals some juristic techniques in action and offers an insight into the structure and operation of the agnatic lineage.

Appendix III. The higher chieftainship, especially within the house of Letsie I, is internally linked by a dense network of cognatic and affinal as well as agnatic ties.

Basutoland

3

MAP 1.



Prepared for British Information Services
by the Central Office of Information, London

R.(DFS)4979/64 Classification II.4

DECEMBER 1964

1) Basutoland 1964-1966 (1)a) General

In 1964, Basutoland was a British colony. It achieved full independence as the Kingdom of Lesotho on 4th October 1966, about two weeks after my second period of fieldwork ended. The designation "Basutoland" is therefore used throughout, except when the post-independence period is specifically referred to, or when a direct quotation in the Sesotho language is introduced.

Basutoland is entirely surrounded by the Republic of South Africa, being bounded by Natal in the east, Cape Province on the south, and the Orange Free State on the north and west (see Map 1). Its total land area is about 11,716 square miles, of which the greater part is mountainous. The Highland plateau stands at an elevation of between 9,000 and 11,000 feet, dropping into Foothills about 7,000 to 9,000 feet above sea level. The lowlands and borders (themselves at an elevation of 5,000-6,000 feet) form a crescent round the north-west and south-west of the country, which extends into a deep penetration up the Orange River Valley.

Extremes of climate range from about 90 degrees F. in the lowlands in the summer to very deep frosts in the winter, especially in the mountains, where winter snowfalls are frequent and intense. Most rainfall occurs in the summer, between October and April; the average

precipitation is about 28 inches a year, but it is not so predictable that well-founded fears of drought are excluded.

b) Demography

The 1966 Population census suggests a total population of about 858,000 persons present within the territory at the time. The number of persons reported absent from Basutoland was in the region of 120,000. This very high proportion of absentees is due to the heavy incidence of labour migration to South Africa, which is a perennial feature of Basutoland's economy and society. Most of these absentees are men aged between twenty and forty years.

About two-thirds of the population live in the lowlands and lower Foothills, where nearly all the arable land is found. (Only about 1,450 square miles of the country's area are available for cultivation, the rest being either grazing land or else mountainous terrain of little or no ecological value.) There is little urban life. The capital, Maseru, with a population of about 7,000, is by far the largest urban area, though smaller centres exist in the other eight district capitals and in one or two other semi-urban areas like Morija, Mazenod and Peka. Population density varies from about 25 persons per square mile in the district of Mokhotlong to about 88 in the district of Berea.

At the 1956 Census, the proportions of which are very unlikely to have changed significantly, of 641,674 persons, 1,926 were Europeans, 247 Asiatics and 644 of

mixed race. About 85 per cent of the African population are Sotho, most of the remaining 15 per cent or thereabouts being of Nguni origin. These differences in ethnic affiliation, however, have little importance either in Basutoland or for the purposes of this study. They do not, in themselves, represent political divisions of structural significance, nor do they constitute linguistic barriers. Virtually all Africans in Basutoland speak Sesotho, though some may have other Southern Bantu languages as well. The official languages of the territory are Sesotho and English.

There has been no European settlement in Basutoland; the great majority of the 2,000 or so European residents live in Maseru or one of the other district capitals, though some live in trading stores at a distance from the towns and a very few have established themselves as adopted Basotho. Nearly all the Europeans are government servants, traders or missionaries; the Asiatics, who live mostly in the Butha-Buthe areas in the north, are almost entirely traders. The category of "coloured" exists because it is recognised as a legal classification in the Republic, but has very little meaning in Basutoland.

About two-thirds of the population are enumerated as Christian, the leading denominations being the Roman Catholic Church (about one-third of the population), the "French Protestants" (about one-fifth -- so called from the Paris Evangelical Missionary Society, the former name of the Lesotho Evangelical Mission), and the Church of England (about 10 per cent). There are many African

independent churches; and about one-third of the population is classified as adhering to traditional beliefs, the greater number of these being inhabitants of the mountain areas.

Education is widespread, most of the schools being run by the missions. The University of Botswana, Lesotho and Swaziland, sited at Roma about twenty-two miles south-east of Maseru, and formerly a University College of the University of South Africa (UNISA), serves all three territories, but the majority of the students come from Basutoland. A national literacy rate of 60 per cent is claimed, and although this figure must be treated with some scepticism, Basutoland nevertheless enjoys one of the highest literacy rates in Africa. It would be difficult (at any rate in the Lowland areas) to find any community without several members who could read and write Sesotho, and a few with some passable competence in English as well (English being the medium of instruction in secondary schools and beyond).

c) Origins and History

The titular founder of the nation was Moshoeshoe I, from whom all subsequent Paramount Chiefs and many of the senior chiefs of the land are descended. The nation was forged in the early part of the nineteenth century during the so-called Lifagane wars, when Moshoeshoe (or Moshesh, as he is often called) established a redoubt on the top of the small mountain of Thaba Bosiu (about fifteen miles east of Maseru) and protected his people

against the Zulu King, Chaka, and the populations that he scattered in front of him in his campaigns. By 1831 Moshoeshoe had become the acknowledged leader of what was to be the Sotho nation. For another thirty years, however, Moshoeshoe and his followers had to defend the territory over which they claimed control against the threat of the Boer Voortrekkers, with the consequence that when the borders of Basutoland were eventually defined at the Convention of Aliwal North in 1869, the Basotho had lost the greater part of the plain running west and north from Maseru and Mefeteng to Thaba Nchu: a rich farming country that now forms part of the platte-land of the Orange Free State. By this time, Basutoland had for about four years been British territory, and the Basotho people British subjects, and so it remained until 1966, with the exception of a period of thirteen years from 1871. During these years, it was attached to the Cape Colony (recently granted responsible government), but after the so-called Gun Wars, provoked by the Cape Government's attempt to enforce a ban against firearms on the Basotho, Basutoland was finally brought under the direct rule of the Queen on 12th March 1884, in response to a petition from the chiefs themselves.

d) Constitutional Development

It was never supposed that Basutoland would remain permanently a British colony, the expectation in Britain being that in due course it would be incorporated into what became the Union of South Africa. Until shortly

before the outbreak of the Second World War, only minimal government was attempted, and no attempt was made to develop the country economically or to prepare it for any other destiny than as a part of the Union. This prospect was resisted, however, even before the post-war governments of the Union (and later the Republic) adopted policies that made incorporation totally unacceptable to the Basotho.

Basutoland was governed by the Crown acting through the High Commissioner to Basutoland, Bechuanaland Protectorate and Swaziland (in his other capacity also later Ambassador to the Republic of South Africa), and immediately by the Resident Commissioner in Maseru. (At a much later stage, the High Commissioner lost his responsibilities, since it became felt that his duties in respect of the three territories were incompatible with his obligations as Ambassador to South Africa; the Resident Commissioner now governed under the direct authority of the Crown.) Effective government was in the hands of the Resident Commissioner, assisted by a Government Secretary and other government servants, including District Commissioners in the (now) nine administrative districts, these in their turn being assisted by District Officers.

In 1903, a Basutoland National Council of chiefly composition was convened, which continued for the next forty years to meet on a regular and official basis as a consultative and advisory body for the guidance of the government of the Colony. In the middle 'forties, district councils were also established, though without

effective power, and a Basutoland National Treasury was set up in 1946. However, it was not until the 1959 Constitution (effective in 1960) that any real degree of responsible internal self-government, even on a limited scale, was given to the Basotho (apart from the chiefly administration, of course, of matters concerning traditional "native" affairs). This was the constitution in force in 1964, and therefore calls for rather more detailed examination.

The principal organ of government was now the Executive Council, consisting of the Resident Commissioner, three senior Government officials, and four members of the National Council. Of these four, one was appointed by the Paramount Chief, the other three by the Council. The Council itself (known as LegCo, or Legislative Council) consisted of four Official members (i.e., members of government), the twenty-two "Principal and Ward Chiefs", forty elected members and fourteen nominated members. The latter were appointed by the Paramount Chief, while the forty elected members were elected from and by the District Councils, themselves (apart from a small ex-officio element) being directly elected in the districts.

The Executive Council was advisory to both the High Commissioner (subsequently the Resident Commissioner) and the Paramount Chief, but was not responsible to LegCo. Each Executive Council member was "associated with" and had some responsibility for the work of a specific government department.

The Legislative Council had a qualified power to propose legislation on all matters that were not reserved to the Resident Commissioner. These reserved matters were mainly concerned with foreign affairs, security, and the Civil Service. Over a wide range of other matters, the sovereign government retained overriding powers, including (residually, at least) unqualified power both to veto any proposed legislation and itself to legislate directly in any sphere.

e) Recent Political History

By this time, organised political parties were active in Basutoland, of which by far the most influential were the Basutoland Congress Party (BCP), the Marematlou-Freedom Party (MFP), and the Basutoland National Party (BNP). The first of these was the most radical of the three, with a strong Pan-Africanist emphasis, alleged associations with Communist China, and a policy that was in effect marked by considerable hostility to the Chieftainship. The MFP was the party of "moderate progressives", and was thought of as the Paramount Chief's party; it was alleged to derive its funds from Soviet sources through the mediation of the African National Congress. The BNP was the most conservative of the three, drawing its support from the middle and lower chieftainship and the Roman Catholic Church. Political activity at this period was intense, the bitterest opposition being manifested between the Congress and the MFP, the latter (through its patronage

by the Paramount Chief and its popularity with the colonial government) enjoying a virtual monopoly of the Executive Council and a nominated majority in LegCo, whilst the former claimed, with every evidence of truth, to enjoy the greatest degree of support among the people as a whole.

These political activities coincided with and indeed were largely prompted by the strong movement in favour of independence (boipuso) that captured much of the nation in the early sixties, and which found formal expression in the 1963 Report of the Basutoland Constitutional Commission. This Report, which owed much of its substance and style to Professor D.V. Cowan in his capacity as adviser to the Commission, proposed an immediate move to self-government, to be followed by the early granting of complete independence. Much of 1964 was occupied in constitutional discussions in London and elsewhere, as a result of which the Basutoland Order in Council of 29th January 1965 was promulgated, and took effect on 1st May.

This was the constitution still in force in 1966, and calls for some brief attention. If the "transitional" clauses, reserving certain powers to the colonial authorities in the preindependence period, are left out of consideration, the effect of the 1965 Constitution was to vest ultimate sovereignty in a bicameral legislature, while recognising the "special position" of the Paramount Chief. The latter was now given the official title of Motlotlehi, and would become King Moshoeshoe II of Lesotho with the attainment of independence. The lower

house consisted of sixty members, elected on the basis of universal adult suffrage in single-member constituencies with simple majority voting. The Senate, or upper house, consisted of the twenty-two "Principal and Ward Chiefs" already mentioned together with eleven other Senators nominated by Motlotlehi. Motlotlehi retained the power to act in accordance with his own judgment over certain matters (including land administration), a Privy Council being established with a general duty to advise him. Executive government reposed in a Prime Minister and Cabinet, responsible to the lower house and broadly conforming to the Westminster pattern. The Senate was clothed with certain limited powers of delay.

The General Election preparatory for the new constitution was held at the end of April 1965. The Basutoland National Party secured 41.5 per cent of the votes cast, Congress 39.5 per cent, and the MFP 16.5 per cent, giving the BNP thirty-one seats in the lower house, Congress twenty-five, and the MFP four; one MFP member subsequently declared his support for the government, thus giving the latter an overall majority of four (2).

This result, which would have been dismissed as highly improbable even twelve months before, was a bitter disappointment for the BCP, who had long regarded themselves as the certain inheritors of power. The MFP had abandoned any serious expectations of national success, but they too regarded the new government with extreme disfavour. In a matter of weeks, Congress and the MFP, for long so bitterly hostile, formed an alliance

devoted to the defeat of the BNP, and (more immediately) to the postponement of independence, which they regarded as likely to confirm the government in office indefinitely on the basis of a minority of votes. Motlotlehi was adopted as the leader and symbol of the intended national struggle against the government and the BNP, a role which he fulfilled enthusiastically -- and much to the government's displeasure and alarm.

This was the situation in the winter (June to August) of 1966. By September, however, it had become clear that the United Kingdom Government proposed to accede to the government of Basutoland's request that independence should be granted, as indeed it was, on the arranged date of 4th October. Nevertheless, the preceding months were marked by a desperate intensity of political activity far exceeding even that of 1964 (3).

f) The College of Chiefs

The 1959 Constitution established, in formal and statutory form, a body known as the College of Chiefs, consisting of the twenty-two Principal and Ward Chiefs, supplemented by certain others, whose principal function it was to determine issues of chieftainship: notably to decide questions of succession to chieftainship, the definition and adjustment of boundaries, the mutual relationships and jurisdictions between different levels of chieftainship, and discipline. All these questions were now withdrawn from the ordinary courts. Under

the 1965 Constitution, the College of Chiefs remained in existence, but its functions were now reduced, in effect, to two: to decide questions of succession to the Paramountcy (including the appointment of a Regent), and to act as keeper of the chieftainship archives. The other matters which had fallen within its purview were now handled either by the ordinary courts or by the political authorities, according to the case.

g) Land Administration

Under both constitutions, the special position of land rights was recognised (though subject, under the 1965 provisions, to the ultimate control of the legislature). The matter is discussed in chapters four and five below; here it will suffice to say that matters relating to the use, allocation and deprivation of land were left in the hands of the chieftainship to be determined in accordance with customary law, the Paramount Chief (Motlotlehi) remaining the ultimate decision-maker.

h) The Courts and the General Law

The judicial structure of Basutoland is twofold, consisting on the one hand of the Roman-Dutch magistrates' courts (known as Subordinate Courts), and on the other of the courts of customary jurisdiction, known as the Basuto Courts (hereafter referred to as Basotho Courts). The jurisdiction of both these classes of tribunal is limited. Representation was not permitted before the Basotho Courts.

From the latter, appeals lie to the Judicial Commissioner's Court (which can also, by fiat, convert itself into a Subordinate Court when occasion requires), the Judicial Commissioners at the time of the research being Mr R.F. Thompson (a European) and Mr G.T. Mohaleroe. Appeals from the Subordinate Courts and (with leave) from the Judicial Commissioner lie to the High Court, which is also a court of original jurisdiction without limitation of competence. From the High Court (whether as a court of first instance or otherwise) appeals lie to the Court of Appeal, and thence to the Privy Council. All the courts mentioned have both civil and criminal jurisdiction. (The Basotho Courts are discussed in detail in Chapter Three below.)

Statute law in Basutoland consists of (a) the statutes in force on 2nd February 1884 in Cape Colony, except in so far as subsequently amended or repealed and (b) local Basutoland statutes. The Common Law is the Roman-Dutch law in force on 2nd February 1884 in Cape Colony, as subsequently interpreted and decided by the Basutoland courts. South African case law, like that of other jurisdictions, is of persuasive but strictly speaking not binding authority. South African decisions involving matters of "Native Law" have much less authority, it being recognised that in this area customary law in Basutoland has followed a different path of development from that found (or attributed to it) in the Republic.

ii) Research Autobiography

Fieldwork in Basutoland was conducted in two stages: (a) January to December 1964 (eleven months) and (b) July to September 1966 (three months).

My interest in Basutoland was first created by my acquaintance with the Paramount Chief, who at the time was a minor and at school and university in England. My academic interest in the country, as a social anthropologist, was stimulated by Dr J. Littlejohn, who introduced me to Dr V.G. Sheddick's study of land tenure (Sheddick 1954), and in the particular area of customary law by Dr (now Professor) M. Banton, who urged that a former lawyer might well make this his first study in the field. I spent a term at the School of Oriental and African Studies in the University of London, where I had the very great good fortune to receive a grounding in written and spoken Sesotho from Dr Daniel P. Kunene, now at the University of California. Dr A.N. Allott, now Professor of African Law, kindly allowed me to attend lectures and classes in his department, and to take part in the weekly seminars of the Restatement of African Law Project of which he is the Director.

During my first fieldwork visit, the bulk of my systematic work was organised around a careful study of the records of the Judicial Commissioner's Court, the archives of which were lodged in the High Court Buildings, Maseru. I was given liberal access to all the files, and was able to work through a total of several thousand

cases, covering the period 1944 through to the point at which new cases were coming up on appeal. Virtually all the files carried a complete transcript of the original proceedings in Sesotho, comprising a long-hand record of the evidence and a complete judgment, for both the Basotho Courts below (or for all three, during the period when the Matsieng Appeal courts were still in existence). Many files also carried an English translation of the Sesotho record, and where the case had been carried through to judgment, the Judicial Commissioner's decision as well. Throughout the entire period, therefore, I was concerned to improve my knowledge of Sesotho, though I did not achieve the standard of competence in the language that I should have desired. After a few months, however, I was able to read most judgments with a sufficient degree of understanding to be able to assess their relevance, and with the help of my assistant, Mr M.M. Sempe, I soon had no difficulty in handling the material.

Much of the earlier period was spent in identifying the problems that were there to be confronted. I had brought some of these with me from Edinburgh and London, but not all of them retained their interest after I had been exposed to the material that I was studying. I came to Basutoland with many typical lawyer's concerns: for example, did Sotho law know the executory contract? This alone seemed, in advance of the facts, in itself a major problem for research; my present conclusion (which indeed extends well beyond Basutoland to cover all customary systems that I am acquainted with) is that in

spite of Elias and Schapera (Elias 1956; Schapera 1965) it does not, except in the special case of bohali (lobola), and that the problem ends there. Again, in what areas and to what extent did Sotho law distinguish contract from delict, or delict from crime? Admittedly, there was some material here that could have yielded a reply, but the intellectual problem itself began to appear both obsessive and parochial. Another inquiry that had suggested itself to me, while still in Britain, was how far and how successfully the legal concepts and principles of one social and cultural system could be translated into those of another. This still appears to me to be both an interesting and an important topic (cf. Vanderlinden 1966), and indeed it is one to which I have addressed myself in several places in the chapters that follow; but I have learned now to be content with stressing the difficulties and delicacies that are involved, and to offer such suggestions as seem possible only with the greatest caution and self-doubt. Certainly, I have abandoned the notion (which a perhaps somewhat chauvinistic Scots legal background had implanted) that a particular trans-cultural virtue attaches to the civil or Roman law; and though a suitable jurisprudential "meta-language" may one day be created to aid the travail de conceptualisation to which Vanderlinden points the way, I now regard it as both premature and pretentious ever to have nourished the ambition of achieving or even approaching this goal in the course of a year or so's work.

One problem, however, that had aroused my interest before I left Britain remained with me and grew. This concerned the relationship between "political" action on the one hand and "law" on the other (to pose the question in the terms in which it then appeared to me). What I had read, not only about Basutoland but other comparable societies (notably the Lozi (Gluckman 1955)), led me to expect that jural processes in a chiefly society would shed light on this problem. And so it proved: moreover, the colonial government's efforts to replace the former Chiefs' Courts and substitute for them a dichotomous system, in which judicial and administrative affairs were institutionally as well as conceptually ~~unlike~~ segregated, meant that the differences between the two types of political order were often very starkly revealed. Much of my attention was therefore directed towards cases which, irrespective of their subject-matter, provided me with material relevant to these interests. My concern with this category of problem is reflected throughout what follows, but is particularly apparent in the theoretically-oriented first and last chapters, and in chapter five, where much of the empirical material in the area of land administration is presented and discussed.

In the course of research, the problems surrounding the relative positions, in law, of widows and heirs forced themselves upon me, and prompted some questions about the status of the concept of ownership in Sotho law. I also confronted the issue of "custom" itself,

and involved myself in some inquiries into its meaning in indigenous terms as well as its treatment at the hands of the governmental courts. These were interests that had existed before I came to Basutoland, but they were given a sharper focus and some changes of direction as a result of my experience in the country.

Of the thousands of cases that I considered, some five hundred were selected for special attention, in respect of which a large volume of copied or transcribed material was retrieved. After my return to Britain, these were coded on to edge-punched cards and have formed an important resource in the preparation of this thesis.

Apart from what I have described as the systematic work that occupied most of my time during this first period, I set about exposing myself as widely and completely as possible to the indigenous society, granted the limited nature of my access to it in the rather special environment of Maseru. The Basotho being a singularly open and outgoing people, however, I found no difficulty in establishing a wide acquaintance, and within that a group of close friends. Some aspects of this relatively informal part of my fieldwork are referred to in an article published in Race in 1966 (Hamnett 1966^b). In general terms, it is difficult to specify or particularise the insights and items of knowledge which I acquired in this unstructured way. One leading concern, however, derived from this part of my experience, and forms the entire subject matter of Chapter Two below. This concerned the ambiguities and ambivalences surrounding

the determination of chieftainship succession and seniority. Though I was able to conscript a considerable amount of the fruits of my legal research into the service of this interest, it arose initially from a casual meeting with the Chief of Leribe, and most of the material that supports my analysis arises from events, arguments and inquiries that bore little direct relation to my study of the court records. (A preliminary statement of my views was published in Africa, see Hamnett 1965.)

Much of my legal research was, of course, continually supplemented, corrected and guided by conversations taken part in or observed, and by other interactions with my friends and acquaintances, and even with those who were neither. Outside the field of law, I developed considerable interest in Sotho riddles and proverbs, both for their ethnographic relevance and for the wider theoretical questions that they provoked (Hamnett 1967^b).

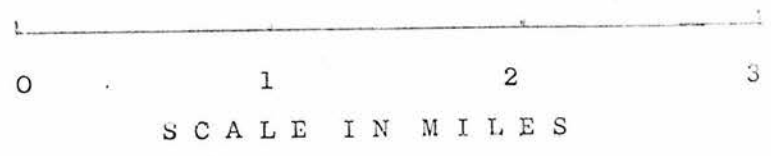
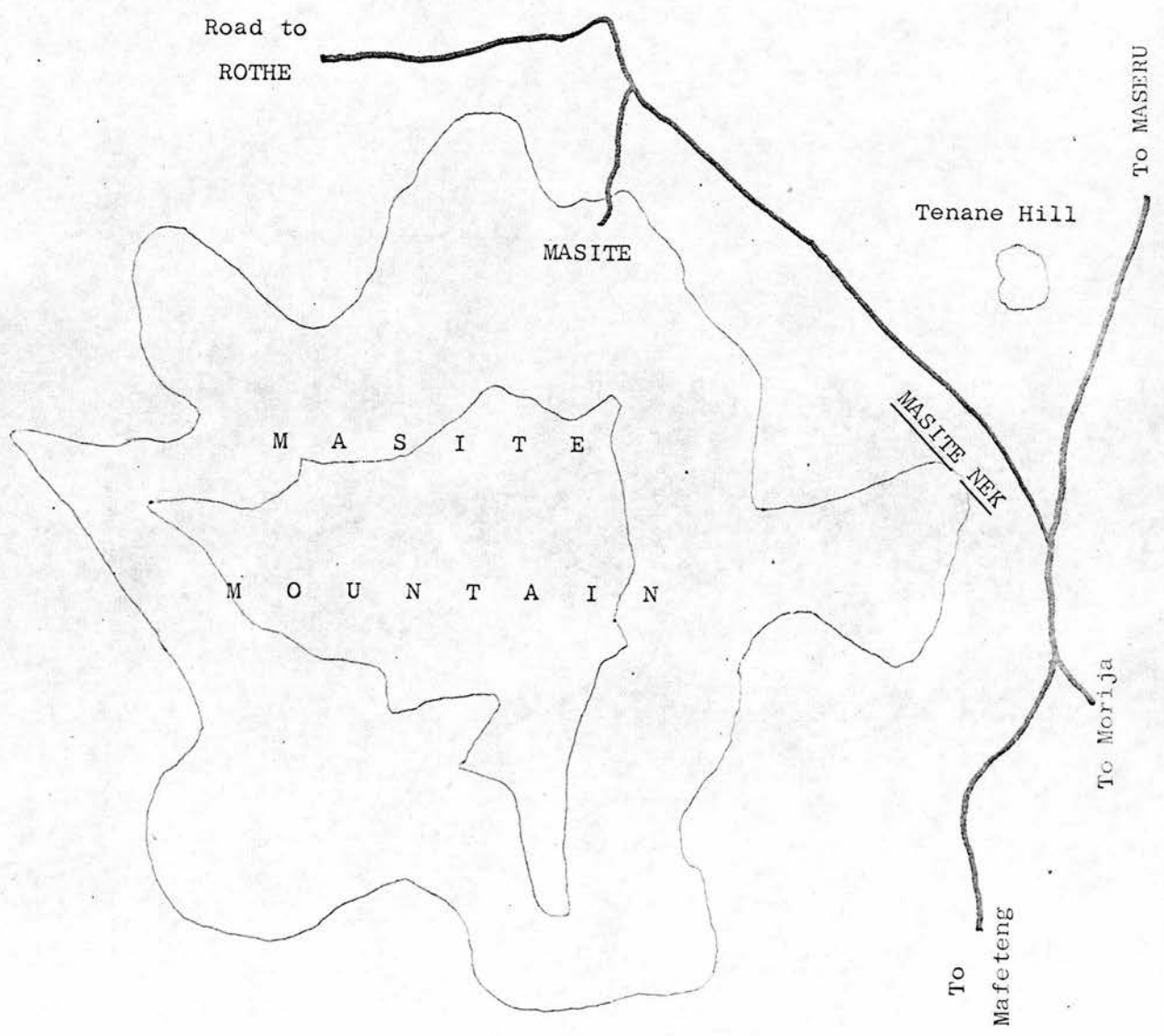
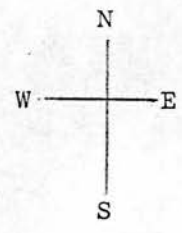
My first period of fieldwork was interrupted, in both a practical and a psychological sense, by a series of unexpected events that left me, quite unwittingly, at the centre of a political cataclysm which looked fair, at one point, to making my further residence in Basutoland impossible. The nature of this disturbance and the circumstances that led up to and surrounded it are not appropriately specified here, especially as, in the event, I was able to continue my life and work in the country. But one consequence was to reduce, to an appreciable if by no means crippling extent, the range of both my physical

and my social mobility. I cannot, however, entirely disown or regret the experience, since had I conducted myself with the reserve and circumspection which would have prevented my falling into this predicament, I should, by the same token, never have achieved the degree or kind of penetration into Sotho life that I was able to do, by virtue of the lack of calculation and purposiveness in the relationships I established. Partly as a consequence of these events, however, I enrolled myself as a member of the Basutoland Bar, which I was able to do with little formality on the strength of my status as an Advocate in Scotland; and this served to give a credible account of my position in the country. It also involved me, to some extent, in rendering this position plausible by actually conducting cases before the High Court; I appeared in both civil and criminal causes on behalf of Basotho litigants or accused, but took steps to ensure that these activities did not make any too serious inroads on my time.

I was acutely aware that most of my time and work had been devoted either to documentary study or to unstructured social interaction in the sociologically unrepresentative context of Maseru. I was therefore glad to be able to correct this imbalance when a grant from the Centre of African Studies in the University of Edinburgh made a second fieldwork visit possible in 1966. The change in political alignments that had occurred in the intervening eighteen months did not, as I have already described, in any way reduce the tensions in the nation:

M A P 2

The District of Rothe, Masite and Masite Nek



rather, they aggravated them. This had implications for my choice of a place of work, and put difficulties in the way of finding a suitable place to settle. However, with the help of friends, I was lucky enough to spend some months in the village of Masite Nek, about twenty-five miles south-west of Maseru, off the road to Mafeteng (see Map 2). This proved, in every sense, a happy choice. The village was strongly Congress, and the generous letter of introduction with which the Paramount Chief equipped me acted, in the new political atmosphere, as an assurance of welcome and acceptance. I stayed with the leader of the women's section of the Congress Party and her daughter in a tumble-down house at the back of the village store. Through this period, I had the advantage of Mr D. Thulo's help and advice, as my continual assistant, interpreter and friend, as well as the use of a horse in daylight hours. Having, on this occasion, no car at any point, I was able to prosecute my work without the continual interruptions which requests for transport to hospital, to church, to school or to town would certainly have otherwise involved.

Masite Nek (4) is a village of about sixty homesteads (malapa), set attractively on the lower slopes of Masite Hill and spilling down on to the edges of the plain below, which stretches over to Qeme Plateau on the northeast, and over to Masite and Rothe to the northwest. Morija is about three miles distant, Matsieng (the royal capital) about five. The villagers hold their "lands" (fields) in the plain, and keep those cattle which remain

directly in their hands in masaka (kraals) adjoining their homesteads. Apart from the fact that it is, at least to Western eyes, more attractive than most Lowland villages, it is, in all the relevant features, probably as typical of its kind as I could have found, in point of size, economy and social structure. By the time that I came to live in it, my central interests had already been determined. In the course of working through the material that I had collected on my first expedition, I had come to focus my interest on the four areas of chieftainship succession, land allocation and administration, inheritance, and the relationship between judicial and administrative processes. My inquiries in Masite ward (the chieftainship within which Masite Nek falls) were directed towards the collection of empirical material that would enable me to carry these interests further and acquire a direct insight into the manner in which the "law" that I had been studying was reflected in the concrete experience of the villagers. My assistant's life-long knowledge of the village and the ward gave me a wealth of background material and history, and in his company I came to know every enclosure, hut and compound in Masite Nek and to gather information about the kinship relations, marriage alliances, stock-ownership and land-holdings of most (though not of all) its inhabitants, as well as accounts, for the most part first hand, of dispositions of property and disputes over land, cattle and jurisdictions bearing upon my basic concerns. In some respects, the months that I spent in Masite Nek seemed

more valuable than the whole of my initial stay in Maseru, although without the experience of the first visit and the crystallisation of inquiry that it produced, I could not have profited so fully from the short period that I passed in the village.

The material that I collected was ordered in two different ways. First, I set up a homestead-by-homestead index of each household and family, in which I incorporated as fully an account of the relevant features of each as I was able to assemble. Secondly, I accumulated much valuable though less systematic material based upon the many hours of discussion, questioning and apparently inconsequential local gossip in which I passed many hours of each day. An attempt was made, each evening, to order and assess the results of each day's work, so that it could be followed through, where appropriate, on future occasions; but much of the analysis was unavoidably postponed until after my return to Edinburgh in late September 1966. References to Masite Nek, Masite and Rothe are ubiquitous in the chapters that follow.

iii) Technical Observations

Language and Orthography

The mostly generally approved name for the language spoken in Basutoland is Southern Sotho (the first adjective distinguishing it from Northern Sotho (Sepedi) and from Setswana (Sechuana)). In these pages, it is referred to simply as "Sesotho". The standard general discussion of the Southern Bantu languages is Doke 1954; the best grammar is that of Doke and Mofokeng (1957), though Paroz 1957 may also be referred to.

Sesotho is fortunate in being equipped with an excellent 600-page dictionary (Mabille and Dieterlen 1961), which constitutes the lexicographic authority on which I have consistently relied, unless positive evidence from local usage suggested otherwise. I have, however, adhered throughout to the Basutoland orthography, except on the rare occasions when a direct quotation has compelled the other course. Paroz's revision of Mabille and Dieterlen is based on the Republic of South Africa 1959 orthography, which however has not been adopted in Basutoland (5), and I have been very willing to adhere to local practice in this instance.

I use "Mosotho" in the singular and "Basotho" in the plural to refer to members of the nation (sechaba). In other contexts, I use "Sotho" without a prefix as a universal adjective (e.g., "Sotho law", "Sotho assumptions", etc.), except in the case of the "Basotho Courts", which are so described rather than (anglice) as "Basuto Courts".

(As previously stated, the country is referred to in English as Basutoland, unless specific reference is made to the period from 4th October 1966, when it is named "Lesotho".)

Sesotho can boast a not inconsiderable original vernacular literature. Apart from the "praise-songs" (lithokiso) and the traditional stories (litsomo), there are several recent and contemporary historians, grammarians and novelists. Of these, the best known is undoubtedly Thomas Mofolo (see Kunene 1967), but A. Sekese, E. Mphahlele and B.M. Khaketla have also achieved considerable distinction.

Secondary Authorities

Apart from historical material, to which specific reference is made wherever relevant in the text, the most important contemporary authorities bearing upon the subjects of this thesis are Sheddick 1954 and Jones 1951. Ashton 1967 contains an abundance of ethnographic material but very little theoretical analysis (see Hamnett 1967^a). Duncan 1960 gives a short and uneven account of Sotho customary law, but bears only too much evidence of the author's considerable (if very creditable) experience as Judicial Commissioner, there being little systematic attempt to disentangle the evidence bearing on Sotho law from the not always informed and certainly never directly authoritative decisions of alien tribunals. There are several points at which Sandra Wallman's absorbing monograph (Wallman 1969) overlaps with my own interests, and

Mr Clifford Morojele's analyses of the 1960 Agricultural Census (Morojele 1962) have proved invaluable in certain places. The best accounts of the recent political history of Basutoland are Halpern 1965 and Weisfelder 1969. Spence 1968 is the best general account of Basutoland or Lesotho to have appeared in recent years. Lord Hailey's magisterial discussion of the administrative history of the territory perhaps commands most respect of all (Hailey 1953), written though it is from the standpoint of a polymath imperial reformer.

Throughout the thesis, the contributions made by these writers are taken for granted; no conscious recapitulation of their material is attempted except where indicated, that being in those cases where specific attention is drawn to their work either in order to abridge discourse or to express disagreement with the views they have expressed.

Mode of Citation

Normal conventions of citation have been adopted in the case of published work and official reports; reference is made to the appended bibliography.

Reported cases in the High Court of Basutoland etc. are reported in accordance with the prevailing conventions, viz., 1926-1953 H.C.T.L.R. followed by the initial page reference for cases falling in those years, and 1954 H.C.T.L.R. etc. for subsequent cases. (The initials stand for "High Commission Territories Law Reports".) Cases reported in the United Kingdom follow the accepted

conventions of case citation in this country. Cases before the Judicial Commissioner's Court are cited as J.C. 100/60, etc. Basotho Court cases are cited as C.C. 100/60, etc., but are necessarily prefaced with the name of the court concerned. Where only one name is given, the names of both parties are identical in the record (thus Khatala J.C. 70/61 indicates that the case is that of Khatala v. Khatala). Cases appearing before the Chief's Courts are cited in whatever manner seems appropriate to the instance at hand.

The Structure of the Thesis

Chapter One sets the subject of the thesis within the framework of my preferred theoretical approach, presenting some leading problems and suggesting how they should, in terms of my general argument, be approached. An excursus is annexed, in which the treatment of the concept of "custom" by the various Courts in Basutoland is critically examined.

Chapter Two is devoted to the complexities of succession to the higher chieftainship and the modes of determining relative seniority within it. In Chapter Three, the chieftainship is examined in rather broader terms, with special attention to the changing relationship between the chiefs and the courts. Chapter Four examines some technical problems of chiefly jurisdiction and area administration. Chapter Five is concerned with land law and land administration, with a shift of emphasis from chiefs to subjects; it ends with an excursus on the question of land shortage in Basutoland. Chapter Six discusses the salient issues in the law of inheritance.

The concluding chapter resumes some of the theoretical concerns raised in Chapter One, and moves towards a proposed reformulation of certain issues, in the light both of the material previously examined and of some other considerations that are introduced for the first time at this point.

There are three appendices. The first proposes

a structure to elucidate the Sotho terminology of affines. The second contains a lengthy analysis of a litigated dispute over a chieftainship. The third plots some of the marriage and kinship links integrating the higher chieftainship, in illustration of some passages in Chapter Two.

Many of the notes are lengthy and their contents important to the discussion, but have been removed from the main text in order to maintain a consecutive flow in the argument (6).

Prefatory Note on Methodology

It was often a difficult problem to decide what items should and what should not count as relevant in a study of "customary law". At the end-points of the scale, of course, no difficulty arose. When I attended a funeral in Masite Nek, there was no doubt that in witnessing the "pouring of the soil" into the grave, I was observing the order of seniority in the deceased's lineage and family receiving ritual expression: this was the "law in action" in a particular context. Equally, it was clear that if a magistrate in a Subordinate Court ruled that a bewys (stock certificate) was invalid since it failed to show the day of the month on which it had been issued, this was a matter which I could with impunity entirely ignore. But there was, and remains, an area of doubt between these points. I could detect in myself a temptation to what may be called the "Real Thing" heresy, which at its worst can

turn into a sentimental antiquarianism: analogous, intellectually, to the distortions present in those who do not wish to acknowledge that, over much of Basutoland, it is easier to hear the sound of a transistor radio than that of a lesiba (a kind of traditional stringed instrument). Conversely, there was a danger of accepting as relevant a judgment by the Judicial Commissioner, simply because it would be, to some degree at least, effective as a resolution of a particular dispute. At different stages of my experience, I found myself moving either towards a too easy acceptance of alien interpositions, or towards a facile rejection of anything that was superficially repugnant to traditional practice or even inconsistent with the material culture of former times. In one sense, indeed, it can be said that the answer to the problem lies in the sociology of the matter: the "real thing" is, after all, that which is real to the actors, and the necessary discrimination can therefore locate itself in action. This is, of course, true, and some of the problems that I imagined were confronting me did yield to this operational attack. But in another sense, they were simply displaced to a higher level. The Basotho themselves have a strong commitment to bokhale, a word which may quite fittingly be translated by such a phrase as "olden times", or even "days of yore". An answer framed too brashly in terms of "sociology" risks the positivist failure to acknowledge that the subjective attitudes of the actors are themselves part of the reality that is being addressed. The difficulty was

compounded by the fact that the indigenous stress on the "real thing" did not necessarily fall where the analyst might put it himself, yet he is compelled to recognise that to collapse the dimension of time into a sociological "present" is to distort what he observes, unless his sociology incorporates within itself a history.

In the converse sense, too, Basotho would often place on the same level items of clearly widely divergent origin: for example, a tradition of genuine antiquity such as mafisa (the loan of cattle) on the one hand, and the government's system of stock-registration on the other. The legal analogue of this can be seen where, as not infrequently, the decisions of the Judicial Commissioner's Court, or even the High Court, do not simply operate to bring one particular dispute to a conclusion, but have made a permanent mark on what is thought to be the law. It would be equally as foolish to reject or analyse out the modifications thus imported by the alien courts as it would be to accept the often misinformed or insensitive decisions of those courts as authentic accounts of customary law.

Time and experience enabled me to reduce these problems, in practice, to manageable proportions; that is to say, they do not present practical difficulties over most of the area where a decision has had to be made. But I have not been able to find a theoretically rigorous answer to the questions that posed themselves, which would derive from an argued methodological principle. There are thus certain apparent inconsisten-

cies of practice in what follows. Sometimes the views of a higher court are taken seriously, more often they are either not considered at all or are briefly mentioned in a note. To a considerable degree, this turns on whether the issue is one of the substantive law (in which case, the higher courts are largely irrelevant) or whether it concerns the relationships and tensions existing between the different structures (and in this case, of course, both types of tribunal are equally relevant to my interests). But in some instances, the weighting to be given cannot be accounted for in such systematic terms, and although I would argue that the election could be justified ad hoc, I have found no explicit rule of method that enables the discriminations to be exhaustively validated in terms of principle.

CHAPTER ONE

CUSTOMARY LAW

I.

Professor Lucy Mair (1962: 19) has regretted the floods of ink that have been, as she correctly says, wasted on debates about the definition of law, of custom, and of "law and custom". What follows is not intended as an addition to this very largely metaphysical, or at least terminological, discussion. But some substantive consideration of customary law and customary systems, both in Basutoland and more generally, seems justifiable, indeed mandatory, in the light of the preoccupations that mark the present study.

Even the term "customary systems" raises an initial problem, at least in so far as the word "system" implies a rigorous, logically ordered and complete array of juristic propositions and normative rules. In the ideal legal "system", at least, all norms are mutually consistent in themselves and in their implications; there are no gaps in it -- no juristic vacuum; and each item can be derived from some other item (a concept or a rule) of higher order. Customary law falls short of all these requirements. The concepts it employs are not rigorously defined; logical ordering exists more by chance than on principles of structure; the scope for deduction is very limited; it is far from being logically complete;

and its rules are not always mutually consistent.

Professor Stone has recently suggested (Stone 1964) what is implied by referring to legal "systems", and since customary law does not measure up to his well-argued requirements, some less misleading term for the assemblage of norms and prescriptions that constitute it must be found. It can more consonantly with modern usage be called an open set. But to say that customary law is a set of normative rules is trivial, indeed truistic. It fails to suggest the specific features that distinguish customary law from any other unsystematic set of norms. The special qualities of customary law cannot be purely negative; no satisfactory conception of customary law can be arrived at simply by taking a systematic legal order and eliminating from it in turn its consistency, its conceptual precision, its completeness and its logic and supposing that the residue constitutes customary law.

The word "customary" itself suggests a more positive approach. Although the term "customary" has misleading overtones for English-speaking lawyers, it has the virtue of bringing out a central characteristic of certain forms of legal order. It deflects attention away from those who teach or interpret the law, and directs it instead towards those who live it and use it. Customary law emerges from what people do, or -- more accurately -- from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe. This is not to deny

that, in any society, some people are credited with a more acute sensitivity to such obligations than others, or even that the incumbents of certain statuses (defined often by age or seniority) have a prima facie claim to possess this greater sensitivity. Differences in human qualities are universally recognised, and in hierarchically ordered societies the senior grades will be assumed to be more, rather than less, generously endowed with wisdom, understanding and insight than other people. Yet the ultimate test is not, "what does this judge say?" but rather "what do the participants in the law regard as the rights and duties that apply to them?" The real task of the customary jurist is to answer this last question, not to apply deductive or analytic reasoning to a set of professionally formulated legal concepts.

Again, the word "customary" itself points to this conclusion, suggesting as it does a law that emerges, not from jurisprudential interpretation, but from the "customs" in terms of which the actors themselves determine their actions. However, there are serious dangers in relying too much on the concept of custom -- whether in its technical or in its everyday sense -- for an understanding of customary law. The first danger arises from the fact that, at least in the English doctrine, "custom", if it is to have the force of law, must have a series of attributes not all of which have any formal application to the kind of law now under discussion. Thus, it is said that a custom must be "reasonable".

But this is usually little more than an ethnocentrism. The test of "reasonableness" has a place only when the authoritative exponents of the law are at a social and institutional distance from the rest of society. Where they are not set at this distance, reasonableness and the common social perception fuse. The test of conformity with statute has, rather obviously, little or no application in societies where no distinct legislative institutions exist. The requirement of immemorial antiquity raises more complex problems, which can be considered in conjunction with those posed by the further stipulation that custom must not change. In the first place, English "custom" of the kind to which these several tests apply, is essentially a particular derogation from or extension of the "general custom of the realm", consuetudines regni. The "custom" in customary law, on the other hand, itself constitutes the law, and is in no way an island of privilege or exemption that prescind from or adds to a more general rule. This does not, of course, mean that one homogeneous body of custom necessarily pervades the whole of society; indeed, nothing is more characteristic of customary law than its particularism and localisation. It means only that any customary norm is, at its own level, the juristic equal of any other and does not have, as it were, to be "proved against" some other norm which is otherwise presumed to apply. English custom, then, is necessarily derogative; it is an exception to a general rule, and is consequently intrinsically

particular and specialised. The tests of antiquity and unchanging continuity, therefore, make sense since they can be taken to justify, juridically, the exceptional case. The most important norms of customary law, on the other hand, are usually quite different in character. Though they are concrete, they are general. Customary law is pre-eminently embodied in a set of concrete principles, the detailed application of which to particular cases is flexible and subject to change (Allott 1960 ch. 3). The principle is unchanging, no doubt, but it is not always an easy matter to determine when any given norm or rule is an authentic principle or is nothing more than the practical application of a general norm to a particular case. If, therefore, custom is to be described as stable or immutable or unchanging, this permanency must be attributed only to the most general norms and not to the subordinate or contingent norms that emerge when a given principle is applied in a concrete case. These subordinate norms can, should, and do change, in response to varying social situations. Moreover, when a general rule is applied in a concrete case, the law is not, as it is in systems that recognise the binding precedent, thereby made more specific or narrow. When the case is concluded, the law returns, as it were, from its brief excursion into detail and reverts to its normal condition of generality.

A further stipulation found in modern systems of law is that custom must be observed as of right. This requirement is different in kind from the other rules,

and is in principle fully applicable to customary law, indeed it is crucial to any analysis. Besides the misunderstandings to which the technical lawyer is liable, and which have just been discussed, there is a further danger of an opposite kind, namely that custom may be interpreted to mean no more than practice. If law is to be looked for not in those who expound it as professionals but in those who live it and use it, it could be supposed that it can be found simply by looking at what people do -- law becomes simply a function of practice. No misunderstanding could be more complete. To make practice the formal source of law in the customary field is to be untrue to the facts, where people recognise in normative law a moral authority, a legitimacy, that they do not accord to practice or usage as a whole. No approach to customary law that fails to take this indigenous recognition into account can ever be satisfactory. The certainty of this distinction is not affected by the difficulty of drawing a precise line of demarcation. People may not be sure whether certain intermediate norms are authoritative or not, but they may still be clear that X is in a real sense "law" while Y is definitely "not law" (cf. Schapera 1955: 37-8). This is all that is necessary in order to make the point. Moreover, norms can never be equated with practice since so much of practice is contrary to the norms. Customary law does not say that a man should not steal his neighbour's chickens more than occasionally, or graze his cattle on another man's fields more than anybody else does. It

says that these things may not be done at all. For these reasons, the test of observance as a right, if interpreted as an affirmation of the authoritative and regulatory character of normative rules, is a critical feature of customary as of any other law.

Another way of putting this would perhaps be to say that practice is not, and cannot be, the formal source of customary law. It remains, of course, its material source, in that customary law is materially abstracted or derived from practice, rather than by a series of logical operations upon a legal formula or proposition. It is not just that the original rule of common law was derived from practice, but was then made the object of jurisprudential operations in the course of its later development. In customary law, not only the original but also the derived norms are related to those who participate -- to the actors in the social situation -- and not only to a professional body of specialised teachers and judges.

The phrase "actors in the social situation" points to the last formal characteristic of customary law to be discussed: its social origin and character. This might seem an obvious feature of all law, and hardly worth insisting upon. However, if the ultimate test of customary law is not "what does the judge say?" but "what do the participants regard as the rule?" the question arises of the eccentric participant or actor who regards as a rule some private and personal predilection of his own. If customary law derives from practices

that are endowed with authority by the practitioners, how is it possible to deal (analytically) with idiosyncratic practitioners? It is to close this gap that it becomes necessary to stress the social character of customary law. The argument here is not that a total "society" -- whatever that may be -- defines one homogeneous law by derivation from universally sanctioned practice; though in fact this meets the case in certain instances, it would be much too rigorous an assumption for most non-literate societies. To say that law is social and not individual is not to imply that between the individual and the total society to which he belongs there are no intermediate social groups whose corporate and semi-independent character validates their own local law. Clans, sub-clans, lineages and even individual families can constitute social groups in this sense, in such a way that the norms to which they attribute authority are socially and not merely individually legitimised. The exact nature of the groups that possess this, so to speak, "public" character will vary from society to society. Moreover, the domain within which this public character exists will vary according to the kind of rule or subject matter involved. Thus, as will be seen for Sotho law, questions of inheritance may be determinable by the immediate agnatic kinsmen of the deceased, while questions of succession to office may be determined by some more widely defined group, and questions of land-tenure may be referred to some other authority again. So variations may be expected not only from society to society, but

also, within any one society, from one type of case or subject-matter to another. The essential fact is that the law is always socially defined. In no known society is it open to each individual to find his own law. The legitimacy, the imputed authority, with which customary law is clothed is not transmitted by a legislative assembly or a specialist judge, but neither is it the product of an individual's idiosyncrasy.

II

The argument so far has raised a number of substantive and not merely definitional issues and suggests a formula that omits purely contingent and accidental features and yet is not entirely trivial. Customary law can be regarded as a set of norms which the actors in a social situation abstract from practice and which they invest with moral authority. The positive content of this definition may be taken as fourfold: the relation of norms to practice rather than to "lawyers' reasoning"; the dominant role of the actors or participants in the determination of law; the authoritative or legitimate, rather than merely factual or utilitarian, character of the emergent rules; and the essentially social nature of their validation and status. But it is equally important to be clear about what this formulation does not say -- the questions that it still leaves open. An examination of these absences will indicate some

further important features of customary law.

In the first place, the formula proposed leaves room for those who act unlawfully. The typical unlawful act is one which the actor knows to be wrong, rather than one performed by an actor who acts on a different set of normative assumptions. In the customary context this tends to mean something rather more than that the actor knows his act to be in a simple objective sense "against the law"; rather, he will himself share the general social evaluation of his act, while hoping that he will "get away" with it. But, and this is the second point, this does not, naturally enough, rule out the existence of different and conflicting interpretations of the law. No doubt this will always be the case, in all legal systems; but in customary law, the point needs to be stressed, not only because a misreading of the argument about law and society might suggest that conflict and disagreement were eliminated, but also because the specific character of customary norms has a direct bearing on the scope for disputed interpretation.

Reference has already been made to the fact that the fundamental norms of customary law tend to take the form of general but at the same time concrete principles, and it was stressed that the effect of a particular application of the norm is not to give added precision or specificity to the law in future cases: rather, the law reverts to its, as it were, "normal" condition of generality when it has accomplished its mission in the particular case in hand. This is one major reason why

disputes over the proper interpretation of rules are a constant possibility. It is reinforced by the fact that, analytically considered, the norms of customary law often seem mutually inconsistent. This inconsistency arises from the fact that legal rules are not considered in the abstract but in the context of different social situations. It is only if the analyst insists upon following all the logical implications of each of two analytically inconsistent norms that their conflict becomes inevitable, and the trained lawyer is tempted to take the view that one of them must triumph and the other perish, or at least that some boundary (whether procedural or logical) must be drawn to demarcate for each its area of competency or relevance. If on the other hand the general and concrete principle returns to generality after each application, it can coexist with other principles without either being sacrificed to the other. At the same time, in particular cases, the two can conflict and provide each of the parties to a dispute with an armoury of legal arguments. The following chapters provide illustrations of this point from Basutoland, in matters of chiefly succession and ranking, in land allocation, and in "private" succession and inheritance.

Nor does the formulation suggested above ignore the fact that some people may be regarded as more authoritative exponents of the law than others. The incumbents of certain positions, typically the hereditary position of chief, may be especially privileged in this

regard. It is true that it has not been a feature of lawful chieftainship in Basutoland that chiefs were despots or tyrants; Moshoeshoe was very different from Chaka, not only in personality but in the character of his office and in his political and historical situation. When a Sotho chief gave judgment, it used to be said "ho lumile" ("it has thundered"); but the despotical implications of this saying are contradicted by a still more celebrated and ideologically fundamental maxim, that "a chief is a chief by the people" (morena ke morena ka batho). Yet too much can be made of the "essentially democratic" character of traditional monarchy. To stress the social and in a certain sense "popular" character of customary law, in chiefly societies as in others, is certainly to recall something of what is implied in the American term "folk-ways"; but this does not exclude the indubitable truth, neatly expressed by Professor Goebel, that a folk-way may be the way of the folk in power (quoted in Plucknett 1949: 7). This indeed is one of the crucial ambiguities of domination (in the sense of Herrschaft, Weber 1947: Part 3; 1954: 322-348). A hereditary chieftainship develops its own interests as an ascriptive status-group, which are analytically (and can become empirically) separate from those of the community. Where chieftainship is itself a central political value in the society, the ambiguities of its domination grow to create a broad area of "indeterminacy", and it is precisely here that "force" is mediated to "law" (or "power" to "authority", in terms of an alterna-

tive and overlapping scheme, Smith 1960). The point will be returned to later in this chapter.

An empirical feature of most customary law is that it is unwritten. This is more than a simple descriptive fact, for it has implications for the kind of law that emerges. When law is ~~un~~written, it is possible to isolate it from its social context and to seal it off in books; jurisprudential analysis can then begin. The fact that customary law is unwritten is one reason why it remains both general and concrete. It remains general because its detailed applications in different places are not made known to all, only the principle being universally remembered, and concrete because detailed logical analysis is impracticable when the analyst has got no accurate and objective reports on which to rely. The doctrine of precedent is hard to set up when there is no written record of earlier decisions. This allows customary norms to be flexible and adaptable, and to function, in Plucknett's words, as "instruments for legal change rather than the fossilised remnants of a dead past" (1949: 7). But it is not just a matter of saying that pre-literate societies lack certain cultural techniques and that therefore their law is what it is. It is hardly too much of a paradox to reverse the order of cause and effect and assert that the unwritten character of customary law is the product or effect of its general nature, rather than the reverse. Max Weber has shown

how essential writing is for the functioning of a modern rational bureaucratic system (Weber 1947). But the relevant point in the present context is that it is not the mere fact of writing but the use to which it is put that is crucial. In Basutoland, it happens to be the fact that written records of the proceedings and judgments of most courts and tribunals are kept, but this is not enough to constitute a "written law", since the records are not, on the whole, then used as a basis for analysis, the establishment of precedent, or the abstract manipulation of concepts. At least until very recently, writing might as well not exist for all the part that it has played in the shaping of the law (1).

III

A comparative glance at legal procedures in an acephalous society will help to bring out some further points, both about customary law in general and about the characteristics of "chiefly" law in particular. Gulliver's admirable study of the Arusha provides an excellent starting-point for such an inquiry (Gulliver 1963). Gulliver shows how dispute settlement among the Arusha depends upon a series of direct or sometimes mediated confrontations at various levels of formality between the disputing parties or their spokesmen, counsellors or supporters. The principal goal of the procedures is to restore the social peace, rather than to impose on a reluctant defendant a set of obligations

(to compensate, to repay a debt, to fulfil an undertaking) derived from an abstract calculation of universal liabilities. The whole process of settlement is set within a framework of normative rules, which define the presuppositions of the parties and draw the contours of their mutual expectations. But no superordinate agent or agency dictates the emergent compromise, or even plays a major role in arriving at it. The procedure is essentially one of mutual adjustment, and it is of course this aspect of affairs that gives the settlement its stability and strength. Imposed settlements of their nature lead to resentment of the part of the unsuccessful litigant; mutual agreement implies equal acceptance of the result. It is, in fact, seen as a breakdown of the traditional and proper procedures if the parties have recourse to the modern magistrates' courts, where judicial settlements may in the last resort have to be imposed upon them, to the lasting dissatisfaction of either or both.

Gulliver contrasts Arusha settlement procedure with the processes of other societies, especially with those that have superordinate chiefs or other more specialised judicial officers. Although his terminology differs from that which Smith adapts from Weber, the trend of thought is the same. He attaches particular importance to the presence or absence of a superordinate officer such as a chief or a judge, arguing that in the absence of such a person the "political" element will play an important part in arriving at a settlement. On the other



hand, where a superordinate judge exists, the "political" element is present only as an abuse, and because of the weakness and fallibility of mortal men; ideally, where a presiding officer superintends the court or moot, the "political" element disappears and only the "judicial" function remains. Gulliver proposes a continuous scale from "judicial" to "political", and very reasonably places the Arusha towards the "political" end of the continuum.

"The resolution of the matter is not a case of reaching a decision as to which disputant is supported by the norms and to what extent.... These processes and inter-party struggles can only be understood in terms of the social system in which the participants are involved in ordinary social life". (p. 301)

This is a very fair way of putting it, and there is no reason to quarrel with Gulliver about the position at which the Arusha should be placed within this framework. But the framework itself is inadequate in several respects.

In the first place, the implied comparison is not being drawn between equivalent levels of structure. Arusha settlements should not be compared with the judicial process in Lozi (Gluckman 1955; 1965), far less in English, society, but with extra-judicial or pre-judicial settlements, which account for the overwhelming majority of "litigable" disputes. Much of what is said of the Arusha could, mutatis mutandis, be said of the ninety per cent of

disputes in contemporary Britain that are settled out of court or before reaching the courts at all.

Of course, it is true that in Britain these settlements are reached under the shadow, as it were, of the courts; the parties or their solicitors know that the courts are there, and this knowledge influences their conduct in working towards a settlement. But this only introduces a second complaint against Gulliver's account, which is that he undervalues the normative element in the Arusha settlement process. He is, though, a meticulous enough ethnographer to provide evidence of this himself, and this is why in the above account of his findings, mention was made of the framework of norms in which the settlement procedure is set, and which defines the moral presuppositions and mutual expectations of the parties. In a relatively homogeneous society, these norms and expectations do not need authoritative exposition by formal courts. But none of the evidence cited makes sense unless it is seen in the context of a normative system overarching the "political" process of compromise and negotiation and injecting into it a standard of what is, in fact, to be regarded as a reasonable rather than a leonine settlement. These norms (as Gulliver says) do of course arise from (though they are not reducible to) "the social system in which the participants are involved in ordinary social life"; but they are none the less real for not being articulated through specialised judicial institutions.

Thirdly, it is misleading to analyse the role of the superordinate judge in the way Gulliver implies. He suggests that the introduction of a "judge" so to speak converts the process from being a largely "political" into an ideally "judicial" one: any "political" elements now present being the results, as it were, of the inevitable imperfections of human-kind. He accounts for the differences between Arusha and Lozi settlement processes largely on these grounds. This is to make too much of the judge's role and at the same time to say too little about it. Quite as important as the presence or absence of a "judge" is the question of whether he is or is not a specialised judicial officer. In most traditional chiefly societies, men were not appointed to be judges: what we analyse out as their judicial function was part of the ascriptive status of chieftainship. A chief has to make many decisions, some of which we may legitimately characterise as "judicial"; but this analytical distinction may have no empirical counterpart in terms of the social perception of the chief's role.

It is contended here that where judicial office is only an analytically separable aspect of a role which empirically comprises a variety of other functions, the persistence of certain "political" features is not to be regarded as a sign of human fallibility but as a structural corollary of the office. It is, in fact, a perfectly legitimate element in chiefly decision-making, where differentiation has not reached a point at which specialised

judges are appointed to carry out specifically judicial tasks. But this does not mean that the "political" element falls outside the area of normative control. This assertion constitutes one of the central themes of the present study, and will be echoed in the chapters that follow as well as re-subjected to a closer analysis in the conclusion. It involves the concept of what may be called "executive law" -- a category of legal action that is not simply reducible to "political" and "judicial" components. Executive law is the characteristic legality of chieftainship. This approach has implications that underline what has been argued in an earlier passage: that there is what may be called a "specificity" about law and legal action that is only obscured by an over-insistence on the notion of "social control". It has been remarked that there is an inherent ambivalence in chiefly Herrschaft, and as a consequence of this there is little point in debating in the abstract whether the putting down of an overmighty subject is the maintenance of a legitimate order or the self-interested defence of privilege (or both). Empirically and extrinsically the two cases are exactly the same, whereas legitimacy lies in the eye of the beholder -- or, more exactly, of the actor. The deficiency of the concept of social control is that it stops short at this empirical and extrinsic identity and obscures the "specificity of law" by distracting attention away from the normative element that discriminates legality from coercion. It is no accident that the vogue for "social control" coincided

with the continued if disguised dominance of positivism in social anthropology. Malinowski was rather too glib in his repudiation not only of "codes, courts and constables" (Malinowski 1926) but of the "cake of custom" too. The rather commonsensical account that tends to emerge from his work is only slightly less improbable than the legalisms and automatisms that he attacked. Much of the trouble here arises, as has been suggested, from the word "custom" and its derivatives (customary, accustom, etc.), where the ambiguities have the effect (here strenuously argued against) of obliterating the distinction between "fact" and "norm"; and of course it is precisely this obliteration that has recommended the word to generations of positivists. But the solution to this theoretical problem is not to polarise "customary" or "executive" law into the analytical dichotomies of "judicial" and "political". Executive law is law (however open its practitioners may be to the subversions of power) just as the specialised "judicial" law of modern societies is law (however open it may be to the subversions of analytical logic). The analyst's task is to describe its operations, and to relate them to the structural features of the societies that characteristically generate it. Much of what follows is an attempt to do this for Basutoland.

Excursus: CUSTOM & THE COURTS

The Judicial Commissioner's Court

Judicial Commissioners have taken varying views of "custom" in Basutoland. They (like the District Commissioners before them, prior to the establishment of a special tribunal of appeal from the Basuto (Native Courts) have frequently had to decide what the "custom" was, and to what extent it was to be given effect to in judicial decisions. This involved the evidential question of how an alleged custom was to be proved, and how to resolve conflicts of evidence, which were not of infrequent occurrence. They had to consider whether it was necessary, and if so to what extent, to have evidence of actual instances of an alleged custom being followed, or whether it was sufficient for a witness to custom (if believed) simply to aver that the custom was as he described it. They had (or so they believed) to decide whether what was argued as custom was in fact no more than common practice, and whether different customs could be contemplated in different parts of Basutoland or in different clans or lineages. Again, they were obliged to consider the question of whether custom could change, and if so by what means, and subject to what kind of evidence or proof such change could be acknowledged. Another of their self-imposed tasks was to determine at what level of generality a

custom, once proved, was to be given the force of law -- whether, for example, the undoubted rule requiring publicity for certain transactions could be regarded as satisfied by means (e.g., letters and documents) that had no application at the time when the custom was supposed to have been set up. A similar and more challenging question was whether the principles of customary law could be applied to situations never contemplated in the traditional context.

The Judicial Commissioner's Court has shown a wide variation in its approach to these important problems. One response, found regularly in the decisions of Mr W.G.S. Driver, was to rest on the concept of custom as defined in English and Roman-Dutch Law. Thus, in Hlalele v. Matlou J.C. 152/54, he stated:

"No person can make custom because custom is something that has become law over long usage. Custom is something that comes from the Dark Ages and there must be evidence that the custom was observed from time immemorial; it must be reasonable; it must be certain".

Again, in the celebrated case of 'Ma-Dyke Letsitsi v. Mafa J.C. 84/53, he quoted Halsbury (Laws of England, Vol. 10, paragraph 423) to the effect that

"a custom to be valid must have four essentials; first, it must be immemorial, secondly, it must be reasonable, thirdly, it must have continued without exception since its immemorial origin, and fourthly it must be certain"

and went on to comment that "no person or body of persons

can alter a custom" (and cf. Driver in Thabana v. Mapesela J.C. 212/53: "no person or body can alter a custom").

On the other hand, in Sekake v. Tautona J.C. 15/59 (see Appendix II), Driver upheld the validity of kenelo (the levirate), in spite of the fact that, in his view, "it may be a decadent custom". It is not clear whether he meant that it was falling into disuse (in which case it would fail the test of non-interruption) or that it was repugnant to good morals and good sense (in which case it would fail the test of reasonableness, and also the universal criterion of natural justice).

Mr W.A. Ramsden's judgments are bizarrely interesting from another point of view. In the case of Makibi v. Mabeko J.C. 11/56, heard at Leribe on 18th January 1956, Ramsden considered Laws of Lerotholi (1946) Part I, sec. 7 (3), which deals with the right of a chief to deprive an occupier of lands if they have been left uncultivated (the substantive law on land deprivation is discussed in chapter five below). He stated:

"My Mosuto assessor is of the opinion that Section 7 (3) is a correct statement of Basuto customary law and I am of the opinion that this fact is notorious that I am entitled to take judicial cognisance of it. In numerous cases... Mr Driver has come to the conclusion that the above section is an accurate statement of Basuto custom and this is now therefore a well-established fact".

On the following day, again in Leribe, Ramsden

considered the same subsection in the case of Letuka v. Klaas J.C. 19/56, and said in his judgment:

"No evidence was led in the courts below... to show that this is a correct statement of the custom. My assessor is of the opinion that it is, but that has not been proved in the way in which it is customary to prove such laws, and such laws, which derogate from the individual's rights of ownership or occupation, may not be lightly presumed".

It may be added that the Mosotho assessor was the same (Tebatso Jonathan Molapo) in both cases.

Ramsden's approach to custom appears in another guise in three subsequent cases, which show that he had not exhausted his interest in Section 7 (3) in the two judgments that have just been quoted. In Ntholi v. Selebalo J.C. 75/76, he invoked the words of the subsection (now once more reinstated as valid custom) that lands may be taken away if the subject fails for two successive years to cultivate it or "cause /it/ to be cultivated". The Judicial Commissioner therefore upheld the subject's right to transfer his usufruct to another, remarking that "the occupation of land is /not/ a personal right of such a nature that it cannot be transferred". He was moreover sufficiently convinced by his own argument to follow rather than reverse this precedent in Khalime v. Lesaoana J.C. 82/56 a few days later. (It may be pertinent to note that in Ntholi's case, all the Basotho Courts were upheld; but the grounds of their judgment were that the loan or trans-

ference of land had been effected with the knowledge and concurrence of the chief; that Ntholi was ntate moholo (father's eldest brother) to Selebalo; and that the lands had been occupied by the latter's grandmother. The substance of the law, again, is discussed in Chapter Five below, but these observations may serve to indicate the radical difference in approach between the Basotho Courts on the one hand and Ramsden on the other.)

In Lekulana v. Paramount Chief J.C. 108/56, Ramsden took his concern with personal rights a stage further, once again founding on Laws of Lerotholi s. 7 (3), and arguing that Basotho have no ius in rem to the land they occupy as subjects, that they are precario tenentes, and lack civil possession. "My duty," he stated, "is to apply the law as I find it". He did not, however, specify which law he had in mind. It could hardly be supposed that an analysis in his terms had Sotho law as its object; while as a gratuitous account of Roman or Roman-Dutch law, he is vulnerable to the observation that the Roman precario tenens does of course, appearances notwithstanding, enjoy possessio civilis.

Judicial Commissioners normally sat with one of more Basotho assessors (see Hailey 1951: 107 ff.). One latent purpose of this was to give chiefs and other persons considered suitable some experience of and training in the administration of civil and criminal justice; but the assessors were also expected to offer advice and guidance to the Commissioner on points of

"Basuto law and custom". Although an assessor (like Tebatso Jonathan with Ramsden) might not be able to bring himself to reverse his settled opinion on a major issue in the course of twenty-four hours, it was nevertheless unusual for there to be such disagreement. In certain crucial areas (especially in relation to the relative position of widows and heirs in inheritance, discussed in Chapter Six below) the terms of the problem are such that (as will be seen) apparently contradictory formulations can both or all be justified in particular cases, and from one case to another, and this goes some way to explain how it was so regular an occurrence for the Judicial Commissioner, in his judgment, to declare that he was fully supported by his assessor, even though another Commissioner (or even the same one on another occasion) would produce another view of the law, again with his assessor's "full support". But this is not a full explanation. Personal discussions with Basotho who had acted as assessors made it plain that they perceived their situation as one of dependency on the Judicial Commissioner, and that more than one had learned the futility of offering advice that departed from the Commissioner's views. Work as an assessor also represented one method of attaining a public position and embarking on a rewarding career; the present Prime Minister, Chief Leabua Jonathan, first entered public life at the encouragement of the late Mr Patrick Duncan, who when Judicial Commissioner frequently took Chief Leabua with him as his assessor. This does not

mean, of course, that all the Judicial Commissioners themselves disliked, much less resented, disagreements from their assessors, but the latter's perception of their situation was inevitably very different from that of the Commissioners themselves.

However, one of the principal sources of evidence as to "custom" was, in theory, the assessor's advice. Another was simply the Judicial Commissioner's own experience in the Courts (though with the exception of Mr Duncan, few had more than a smattering of Sesotho). But not infrequently, evidence as to custom was heard, and here there is uncertainty as to whether the witness should speak as an "expert" on the law, or whether his function was rather to give evidence of fact, showing that a certain custom had in fact been followed on particular, named occasions and had never (lawfully) been departed from. The implication of Duncan's remark in Jonathan v. Benjamin J.C. 97/52, in discussing a point that he accepted as valid custom, to the effect that "the principle is not well-enough known in Basutoland" points to the view that evidence of custom is expert evidence on law; but there is little consistency in the general run of cases, though the weight is in favour of the "expert witness" view of Basotho called to give testimony on custom.

Mr R.F. Thompson's judgments confronted some interesting questions. This Judicial Commissioner's approach was very different from that of most of his predecessors and colleagues. In Molapo J.C. 77/60, he said that

"there may be a contrast between the custom of the dim past and that of today", and did not hesitate to uphold the contemporary law. This view is consistent with his statement in Monare v. Koela J.C. 89/59 that the character of Sotho customary law is such that "it has the inestimable advantage of not crystallising outmoded laws and customs which are being abandoned in favour of customs evolving as more suitable to modern conditions" (and cf. in Sofeng v. Letsie J.C. 97/63: "Sesotho custom is not a rigid system"). In Matsepe v. Serame J.C. 75/63, he considered a case involving a partnership between two Basotho, who carried on a brickworks on land allocated to one of them. Serame, the allottee, was attempting to exclude his partner from the business. Thompson stated:

"While Sesotho custom may not have yet evolved a system of law to meet modern developments nevertheless cases such as this are within the /Basuto/ Courts' jurisdiction and the courts have to apply the general principles of law and custom to reach an equitable decision between disputants as best they can, and law and custom is a set of principles which develop with the ages".

He upheld Matsepe's rights under the partnership agreement. In S.S.4 Trading Store v. Molapa J.C. 153/63, however, the commercial technicalities put the matter well beyond the scope of even an "evolved" custom, and Thompson referred the case to the Subordinate Court (i.e., the Magistrate's Court) for the application of Basutoland Roman-Dutch Law.

Thompson was here skirting the much-debated topic of whether Sotho (or other) custom knows the executory contract. In spite of Elias (1956: 144 ff.) and Schapera (1965), it is arguable that it does not, except in the particular case of marriage where special considerations apply (marriage is in fact Elias's principal ground of argument; and Schapera's examples are all reducible to cases of contract for executed consideration). But it is not so much the substantive law enunciated by Thompson in Matsepe that is of interest here as the expansive and creative view of customary law as a whole which his remarks imply.

The High Court

In general, the view of the High Court was that which transmitted itself to the Judicial Commissioner's Court, from which it was the immediate court of appeal. There was a similar reliance on Halsbury and on the English or Roman-Dutch views of custom as having the requirements of immemorial antiquity, continuity, certainty and reasonableness ('Mantsebo v. Bereng J.C. 245/45 (de Beer J. in the High Court); Lansdown J. in Bereng Griffith v. 'Mants'ebo 1926-53 H.C.T.L.R. 50). However, it was firmly stated in Mots'oene 1954 H.C.T.L.R. 1 that the argument that custom must be proved only by specific instances "has no application.... It is true that... the word 'custom' is used, but in fact what we are here dealing with is a 'law'. And... the best

evidence... is the evidence of those who by virtue of their experience may be expected to be familiar with it".

The Basotho Courts

Some presidents of the Basotho courts have been more influenced by Roman-Dutch law, and by the "native law" emanating from the District Commissioners' and Judicial Commissioners' judgments, than others, and considerable variation is due to this. There is a tendency in some cases for a court president to seize upon some fragment of "law" enunciated by a European or other technically trained judge or magistrate and rely uncritically upon it, sometimes (though not always) unconsciously modifying or even reversing the original sense and intention of the utterance in question. In the matter of custom, the Paramount Chief's Court and other Basotho Courts would on occasion pay more attention to the published Laws of Lerotholi Part I than their authority, in either customary or statutory terms, warranted; though in fact this was, often enough, more because the Court of its own impulse sought to come to the conclusion indicated by the text, and used it as a convenient basis for decision. Where it preferred another interpretation, it was ready to state that the Laws of Lerotholi were merely purported declarations of custom, which was not necessarily as stated in them (cf. judgment of the Paramount Chief's Court in Sekake v. Tautona J.C. 15/59, Appendix Two).

But the Basotho Courts have been ready to hear evidence on custom. In Lenka v. Mantsieng J.C. 4/51, the Paramount Chief's Court heard evidence on the relative seniority of the Tlokoa, Phuthi and Peli clans (liboko) not only from expert Basotho witnesses but also from publications of European authorship, including Ellenberger's history (Ellenberger 1912) and works by the French Protestant missionary E. Jacottet (and see also Bereng J.C. 99/50). Goliath's evidence in Sekake (Appendix Two) was professedly entirely that of an expert on custom, not at all as a person informed about the particular case under dispute. The strictness with which the Basotho courts approached the question of proving custom tends to reflect their view of what is being argued for. In Shale J.C. 592/52, the court at Matsieng (C.C. 148/51) required the appellant to prove the custom of marriage to the grave (ho nyalla lebitla). This form of marriage had been statutorily abolished by the Paramount Chief's rule in Laws of Lerotholi Part II sec. 34 (3), and it might have been argued that this abolition impliedly affirmed the previous law. However, Chief Kelebone Nkuebe, one of the wisest judges in Basutoland, argued that the appellant had "failed to satisfy this court that marriage to a grave has been lawful, and the two witnesses... do not show what was the law or custom in 1922". The fact is that there has been an indigenous tendency to turn against the more "exotic" forms of marriage, which tend to complicate issues of succession and lead to intractable disputes;

and Kelebone had in fact made up his mind to reinforce this tendency in Basotho opinion by putting the appellant to a probably impossible proof, in view of the lack of prior warning. The judges of Chief Makhaola's court at Qacha's Nek in Sekake's case, considering the legality of woman marriage, found not only (a) that there was insufficient evidence of the custom but also (b) that such marriages had been the cause of incessant unrest, as well as (c) that they were contrary to law (Appendix Two). This again is an instance of the dislike in which such marriages were being regarded and of the way in which courts were able to thwart claims based upon them if they wished to do so. Kenelo (levirate), on the other hand, being an approved custom, was held to be law, in spite of the prima facie meaning of the Laws of Lerotholi, since there was nothing in the law actually forbidding it. Those in whose interest it was to argue the reverse, however, claimed that the custom had fallen into disuse: a position involving the difficulty that even if that were the case at the date of the hearing, it was not therefore necessarily true of the situation when the kenelo issue had been born.

In Molapo J.C. 205/63, the court at Tsifalimali under M.D.L. Masupha, another well-known Mosotho, attacked the practice of marrying for the senior house, commenting that "anybody could at any time marry a junior wife for the senior house, so that the succession devolves on the last house. Although I do not deny

that this custom has existed all along and is still continuing... I firmly deny that it is valid, because it runs counter to the law of succession and is therefore illegal". This is a more direct assault on custom, in that no factitious doubts are raised as to its existence or the mode of its proof. What is done is regarded as a common but unlawful practice which e sa ipapisa le molao le toka -- "is not in conformity with law and right".

The common word for "law" is molao (plural melao). This comes from the stem lay-, from which are derived the verb ho laya, to correct, reprimand, warn, and the derivative verb ho laela, to order, command, instruct. The "Laws of Lerotholi" are Melao ea Lerotholi. The word "custom" is generally translated by mokhoa, usually in the plural mekhoa, or moetlo, pl. meetlo. Sometimes a distinction is drawn between molao on the one hand and moetlo (or mokhoa) on the other. Thus in Legheku v. Pholoana J.C. 287/47, Mojela in the Paramount Chief's Court said of the custom of tlhabiso (the slaughtering of an animal to mark bohali payment) that the requirement of the bride's presence at the slaughtering of the tlhabiso beast "is not molao, it is moetlo", adding that "marriage is law" (lenyalo ke molao). But another judgment affirmed that the bride must be present, and stated that this was the molao le moetlo ("law and custom") of the Basotho.

However, there is very little to be gained by teasing out refinements in the use of these terms in relation to "law" and "custom". Basotho do not (within

the area of semantic overlap of the three) use them with much precision. In particular, the words molao le moetlo are regularly used as a twin pair, much like "law and custom". Indeed, the pair moetlo le mokhoa are also used in the sense of "law" (e.g. Seenzile J.C. 143/61, A.C. Court). Conversely, in Tsepe v. Peete J.C. 158/47, the Paramount Chief's Court used molao to mean law and (non-legal) custom indifferently, and described a certain "custom" (molao) as being against the "law" (molao again). It is not in a pedantic definition of terminology that the view of the Basotho courts is to be found. This is seen again in Lekhela v. Shishila J.C. 74/65 where the court at Lejone declared that "in the custom of this country (moetlong oa naha ena) land allocations are public acts.... Private allocations are unlawful (e se tsa molao)".

The substantive issue was raised in Manyebutse J.C. 49/44, where the claim was made that in a particular area, it was the custom for a chief to resume lands after a death, even though there were children left behind in the family. The Paramount Chief's Court described this "custom" as a tloaelo, meaning a "habit" or "accustomed practice", and stated that its judgment proceeded "not in accordance with the custom (tloaelo) which you say is practised in your area, but in accordance with the law (molao)".

Here, the (non-terminological) issue is raised of local custom, as a derogation from general practice.

A distinction must be made according the generality of the rule or norm involved. It is shown in Chapter Six below, for example, that in matters of family succession and inheritance, the really cardinal rule is that now formalised in Laws of Lerotholi (1959) Part I section 14 (4), requiring the calling of a council of the lelapa ("family") of the deceased, and that the substantive norms represent the principles which inform the debates within that council. The Basotho courts do not reject even a wide variation in practice between one "family" and another in this respect; and of course such practice may reflect a private "custom" of the particular lineage or clan or tribal group involved -- more especially where the various non-Sotho and non-Koena groups are concerned. But where, as in Nkuebe J.C. 591/52, an alleged exception strikes at a basic principle, another view is taken. In this case, it was claimed by Chief Sempe that chiefs do not return cattle on divorce, though commoners must. D.M.L. Mojela rejected this argument as impertinent, and commented:

"The 'custom' means that which applies to the nation generally; it cannot affect only a certain sector of it.... The court admits that this witness may produce evidence showing that chiefs do not return cattle, but it will be found that such action never came before a court.... Law and custom should be the same throughout the nation".

The court was recognising here that chiefs, in point of fact, can often do what they please, since they have a

good expectation of not being brought to book for it; and of course when chiefs conducted their own courts directly, this was much truer than it has been since the implementation of the 1938 Khubelu proclamations (see Chapters Two, Three and Seven below). But in rebutting Chief Sempe's claim, Mojela went too far, since it is quite clear (as Chapter Three makes plain) that in several critical areas different laws apply to chiefs and to subjects; in the case in hand, however, there was no such area involved, and the chief was simply attempting to erect his practice into a legally-protected custom.

CHAPTER TWO

THE PUBLIC LAW OF CHIEFTAINSHIP AND SUCCESSION

In this discussion, the traditional political system has been isolated for purposes of analysis (1). Strictly speaking, rights of chieftainship and succession in the period of the research derived ultimately from recognition by the High Commissioner, in terms of the constitutional law then prevailing in Basutoland (2), though within this framework, recognition of chiefs effectively rested upon the "final decision" made by the Paramount Chief under Section 80 of the Basutoland (Constitution) Order in Council 1959. So far as the judicial courts are concerned, the Gazette is the final and conclusive criteria of Chieftainship. In this is published the full list of recognised chiefs, together with the name of their area and their place in the hierarchy. The publication of a new Gazette fortunately coincided with the beginning of this inquiry, so that an up-to-date list was available.

However, the law governing chieftainship and succession as here described is neither that of governmental recognition nor even that of the statutory "final decisions" of the Paramount Chief. The purpose of this chapter is to elucidate the nature of the customary law of succession to the higher chieftainship, largely in abstraction from the formal processes of the administering colonial authority of the time. The Gazette lists

are far from irrelevant to the customary structure of chieftainship, but they are not for the present purpose conclusive of it.

Basutoland is administered by a centralised and hierarchical chieftainship (borena). (The only territorial areas that fall outside chiefly control are those expressly reserved by statute -- notably the principal towns and administrative headquarters of the colonial administration, which are directly supervised by the District Commissioner or other statutory authority). At the head of the hierarchy stands the Paramount Chief, whose jurisdiction extends over the whole nation. The title is not indigenous, and has no specific translation. In Sesotho, he is known as morena e moholo, which means simply "the great chief", and though this term is used of no other person, it is in no qualitative sense linguistically marked off from the word morena used of any other chief. Recently, the formal title of Motlotlehi ("one who deserves praise") was introduced as the official designation of the Paramount Chief (subsequently king). But there is no Sesotho word that exactly translates the word "king". Borena, chieftainship, is a noun formed by adding the prefix bo- to the stem -rena. This prefix generally has the effect of turning a stem into an abstract noun describing a state or condition. The verb ho rena means "to be rich, not to work; to be a chief" (3), and morena thus means "chief". Borena means "chieftainship, kingship, government, authority" (Paroz

1961: 427b). The word also shades off into a collective sense, and can refer by implication to "the chieftainship" as a corporation. Thus, in one case, a Basotho Court rebuked an accused for "showing disrespect for chieftainship" (Hlangamadla v. P.C. J.C. 224/64); in another, the Paramount Chief's Court increased a fine imposed on a disobedient headman, on the grounds that he was "evidently a man lacking in all respect for the chieftainship set over him" (o talimaha e le motho ea sa hlompheng ho hang borena bo mo okometseng (Mahase v. Borena J.C. 59/52)). The "chieftainship" (in its collective sense) has, in fact, a collegiate character, in which the Paramount Chief has a preeminent role, but which he does not exhaust (4). It is a matter for a separate discussion to determine how far and in what sense "village heads" (bo-ramotse) or even bugles (li-phala) and messengers (maqosa) may be said to be sharers in borena. But in common usage, the term morena is used widely and unpedantically, as a sign of respect. Close relatives of chiefs are regularly addressed as morena; and the term is, of course, used in a more direct sense of certain established village heads, whether these are gazetted or not.

Below the Paramount Chief stand the twenty-two Principal and Ward Chiefs, each having jurisdiction over the whole of his ward. (The term "ward" is used to indicate any area of chiefly jurisdiction, at no matter what level of the hierarchy.) The distinction

between Principal Chiefs and Ward Chiefs is somewhat complex. All twenty-two are, in fact, Principal Chiefs, except for the Chiefs of Tsikoane and Kolbere (one ward), and Malingoaneng. Tsikoane and Kolbere is a dependency of the Principal Chiefdom of Leribe, but has semi-autonomous status as a result of the problems arising from the succession to Moshoeshoe's second son Molapo (5).

Malingoaneng is a dependency of the Principal Chiefdom of Mokhotlong, originally owing its special status to the fact that it is occupied by the Ba-Tlokoa people, having been awarded to them, under their leader Sekonyela, for their part in the so-called Gun War (1880-1881) (Tylden 1950: 145-170; Ashton 1967: 190 f., etc.). This did not end the vicissitudes of Tlokoa history in Basutoland; in 1925 Paramount Chief Griffith placed his senior (6) son and eventual successor Seeiso over Lelingoana, the then Tlokoa chief, and a few years later attempted further to demote the chieftaincy. The dispute was still in the judicial courts in the late 'forties (Lelingoana v. P.C. J.C. 31/46), but the recognition of Mosuo Lelingoana as "Chief of the Tlokoa" in 1948 combined with his subordination to Mokhotlong to produce a viable compromise (7). The Tlokoa are in this respect rather better off than some other "immigrant" groups, though not quite so well provided for as the Ba-Taung or the Makhoakhoa, each of whom have a full Principal Chiefdom. During the period of this study, membership of the twenty-two carried membership of the College of Chiefs (set up under the

1959 Order in Council), a body whose function it was to determine issues of succession, jurisdiction and discipline among the chieftainships (8).

The twenty Principal Chiefdoms are:

Butha Buthe	Thaba Bosiu
Makhaokhoeng	Tebang
Leribe	Matelile
Mamathe's	Likhoele
Majara's	Shamong
Koeneng and Mapoteng	Taung
*Matsieng	Quthing
Rothe and Masite etc.	Ratsoleli and Mashai
Maama's	(Qacha's Nek)
Ramabanta's (Kubake)	*Mokhotlong

*(During the revevant period of the research the Principal Wards of Matsieng and Mokhotlong were held directly by the Paramount Chief in his capacities as Principal Chief of the two Wards. The wards were administered by Reentseng and Bofihla respectively (each the son of a different and junior house of Paramount Chief Griffith).)

In each principal ward, there are a varying number of chiefs or headmen directly subordinate to their principal chiefs; for example, in that part of the Principal Ward of Rothe and Masite that falls within the administrative district of Maseru (9) there are thirteen such chiefs. Of these thirteen, ten have in their turn lesser chiefs or headmen directly subordinate to them, to a total of forty-eight. Of these forty-eight, one (a headman) has a headman subordinate to him, making a total of sixty-three jurisdictions.

In Basutoland as a whole, there are about 1,120 chiefs and headmen altogether -- in some respects an astonishing figure for a total population of less than 1,000,000 and a resident population much lower than that. Moreover, these figures relate only to gazetted chiefs and headmen. Many others possess a de facto jurisdiction, in positions subordinate to those listed in the Gazette (10).

It is normal for the Principal Chief to hold at least one of the substantial chiefdoms in his ward in his own name. Thus, in the example from Rothe and Masite already given, Mohlalefi Bereng (whose full title is Principal Chief of Rothe, Masite, Serooeng, Lets'eng, Kolo-ha-Mohlalefi and Thaba-Tseka ha Ntaote) holds one of the thirteen immediately subordinate chiefdoms himself, namely, that of Rothe and Masite, to which seven headmen are attached. In fact, a chief at any level of the hierarchy does not grant the whole of his ward to subordinates, but retains a part in his own hands, so that the sum of all the subordinate wards in any chiefdom is not as great as the totality of the superior ward of which they are parts.

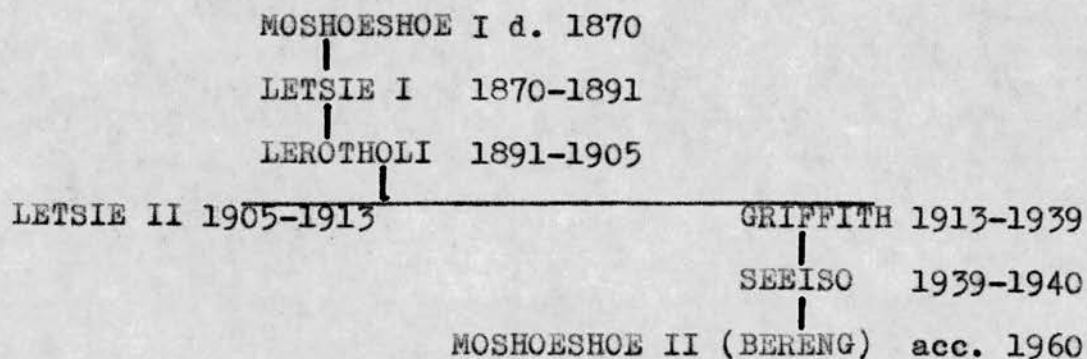
The ruling dynasty in Basutoland is normally described as belonging to the Koena (Crocodile) clan, and this terminology will be retained. It is, however, not completely accurate, in that the Bakoena form a much larger group, of which the Basutoland branch is only a part, and a rather junior part at that (11);

within the Bakoena, the Basutoland chiefs are more properly known as (Ba-) Mokoteli. Some Basotho insist on the point (more especially if they are descended from one of the more senior Koena lines, such as Ts'olo or one of the senior sons of Monaheng), but in everyday parlance it would be pedantic -- or else combative -- to make an issue of it. In any case, the term Koena serves to distinguish the principal chiefly group from the other Sotho clans in the population: Fokeng, Rolong, Phuthi, Taung, etc.

According to a fairly recent survey, not more than about 30 per cent of the population are Koena (12). However, the bulk of the chieftainship are Koena chiefs. Most of the discussion in this chapter will be concerned with the internal relationships within the Koena chieftainship, though some attention will be paid to certain aspects of the process whereby they obtained their present supremacy.

Moshoeshoe I, the founder of the nation, died in 1870, leaving four sons in his first house (13). These were, in order, his heir and successor Letsie I; Molapo; Masopha (Masupha); and Majara. Attention will be focussed mainly on the relationship between the first three of these, and the chiefly lineages descended from them. Each of these three brothers is the starting point for a major lineage, hereafter referred to as a "cardinal" lineage (segment, descent group, chieftainship etc.), finding its apical ancestor in one of

these three. The senior line represents the succession of the Paramount Chiefs, which is as follows:



Certain problems arise in relation to this line of succession, which may be discussed before the other cardinal lines are examined. These problems raise general questions regarding the law of succession and have application beyond the Paramountcy.

Duncan informally but reasonably writes that "the traditional law controlling succession might be described as 'heredity modified by expediency'. That is to say, normally succession would be by heredity, but if a chief were totally unsuitable, particularly in a crisis, he would be passed over in favour of a better man, preferably a member of his own family" (1960: 48). The present law is much more rigorous than this, as expressed in Laws of Lerotholi (1959) Part I, sec. 2:

The succession to chieftainship shall be by right of birth; that is, the first born male of the first wife married; if the first wife has no male issue then the first born male child of the next wife in succession shall be the chief. - Provided that if a chief dies leaving no male issue, the chieftainship shall devolve upon the male following according to the succession of houses.

Historically, the rules exhibited a preferential tendency to primogeniture, and, even with this framework, different particular rules were held to apply by persons with different interests. Thus, Nehemiah was the sixth of all the sons of Moshoeshoe, a child of the third house. Moshoeshoe had one son (Neko) in his second house. Nehemiah argued that the third house -- that of the "wife of the breast" -- took precedence over the second house and also (apparently) over all but the eldest son of the first house.

"Letsie alone, as eldest son, is entitled to the chieftainship, and I follow him in rank. I would take Letsie's place" (Moshesh 1880). The history of the law of succession over the following sixty years represents the growing ascendancy of the primogenitural principle in Basutoland. This ascendancy was achieved across political conflicts, and though easily capable of post hoc legitimation, it is to be seen as the culmination of a political process rather than as simply the full implementation of any certain and pre-existing rule of law (14).

The conflict began even before Moshoeshoe's death. Moshoeshoe did not wish the succession from his heir Letsie to pass to Lerotholi, the son of Letsie's second house (there being no surviving male issue of the first house). Moshoeshoe attempted to pass the succession through the daughter of the first house, Senate. The plan failed, and Lerotholi in due course succeeded to his father as Paramount Chief (15). Lerotholi took

the leading part in setting up the Basutoland National Council, one of whose first acts was to issue a declaration of law and custom (16) in which Law One stated the law of succession in terms very similar to those of the 1959 amendment, sec. 2, quoted above. Duncan is probably right to comment that "it may... be assumed that Lerotholi's desire was that his new council ought to record the custom of descent through the male line..." (Duncan 1960: 44).

A further point of interest in Lerotholi's succession concerns the composition of the group convoked to determine the candidate. In both public and private succession, the initial consideration of the matter lies with a "family council" (17). On Letsie's death, the council consisted of Letsie's own sons. But on the suggestion and recommendation of the Resident Commissioner, the "Sons of Letsie" were enlarged to include the "Sons of Moshoeshoe" -- Masopha; seven sons of Letsie; three sons of Molapo and Majara; one son of the full brother of Moshoeshoe; one son of a half-brother; two nephews; and one other relative -- sixteen persons in all. This incident has important implications for the ensuing analysis: it reveals a tension between two principles of succession, the one tending to regard each successive chief as a "new" Moshoeshoe, the other tending to see the treble (strictly quadruple) lineage structure deriving from Moshoeshoe's sons as the permanent, once-for-all framework of the political

and legal order. The enlargement of the "Sons of Letsie" to the "Sons of Moshoeshoe" can also be seen from a slightly different aspect as founding an assertion that the choice of the Paramount Chief is a matter for the whole nation (through its chiefs, or at least through the Koena-Mokoteli chiefs) rather than for a succession council composed of the immediate family (lelapa) of the deceased Paramount.

Related problems arose on the death of Letsie II in 1913. Letsie left only an infant son, and his senior widow, 'Mahali, made no claim to act as regent during the child's minority. His junior brother of the same house, Griffith, seemed already anxious to play for higher stakes. Then, after an inconclusive meeting of the Sons of Moshoeshoe at Matsieng, the infant died, and the way was clear for Griffith to claim the Paramountcy direct -- to sit on the throne "with both buttocks". At this meeting at Matsieng, no suggestion was made that only the "Sons of Lerotholi" should make the decision -- or so it was stated by Jeremiah Moshoeshoe, son of Moshoeshoe's junior son George, giving evidence at the age of 72 in the succession case before the High Court (Bereng v. 'Mantsebo 1926-1953 H.C.T.L.R. 50). According to the same source, Chief Jonathan Molapo objected that a posthumous son might still be born to a widow of Letsie. This was a reference to the law of kenelo (levirate), the effect of which is that a son born to a widow as a result of kenelo-union with an

agnate (usually a younger brother) of the deceased, is recognised as a son of the deceased. The validity of kenelo has recently been upheld in the Paramount Chief's court, and some consideration given to the proviso in the existing Laws of Lerotholi, sec. 2. The court decided that the proviso applied only where there was no surviving posthumous child at the relevant time; in other circumstances, a posthumous child assumes the position of his deceased pater. "According to Basotho Law and Custom a child is begotten by the cow (ngoana o tsoaloa khomo)" (18). This certainly fits Griffith's own policy well, since he accepted the throne under the explicit reservation that subsequent kenelo-children born to his brother's widow should have no claim. The "Sons of Letsie" endorsed Griffith's accession, in terms of a letter to the Resident Commissioner from Chiefs Maama and Mojela Letsie "on behalf of the Sons of Letsie and the Matsieng people". Matsieng was the site of Letsie's home, and this letter can be seen as an assertion (albeit a complaisant one) of the special relevance of the lelapa even in a matter of the "national" chieftainship. Griffith's accession thus represents a certain degree of change in the law of succession, since from one point of view it appears to assert propinquity to the first cardinal line as the criterion of seniority. Yet it can be, and sometimes is, regarded simply as a modification of the rules governing posthumous children and nothing more (19).

Further difficulties arose with the succession to Griffith. Griffith had no sons from his first house. In his second house, his heir was Seeiso, who was born in 1905; and in his third house he had an older son, Bereng, born in 1902. Griffith wished Bereng to succeed him. (Chief Goliath (see note 19 above) claims that Seeiso's mother, Sebueng, deserted Griffith and returned home to her father, Chief Nkuebe Letsie of Quthing; the problem was resolved at Lerotholi's instance when Nkuebe provided another daughter as a seantlo wife to replace Sebueng (20). But the incident was a plausible ground on which Griffith could claim that Bereng was his senior son -- whose mother (like two other wives of Griffith) was also a daughter of Nkuebe.) In the event, Griffith was not successful (21); but, again, the frustration of his original wish should be seen as a stage in the development of the law, rather than the simple victory of an already known law over political ambition. It is relevant also to notice that both when Griffith sought to promote Bereng, and when after his death the decision was made for Seeiso, a plenary meeting of the "Sons of Moshoeshoe" was summoned (though on the first occasion only thirty-three of the seventy invited appeared, of whom twenty-two supported Bereng).

These issues came up for renewed debate with the death of Seeiso in 1940, after a very short reign. In his first house, Seeiso married a daughter of Chief

Sempe of Quthing, and had from her a daughter Nts'ebo, but no sons.

In his second house, he married the daughter of a Tlokoa chief from Mokhotlong, and in this house the eldest son is Bereng Seeiso, later Paramount Chief, who was born in 1938. In his third house, his son is Leshoboro, born a few years before Bereng and now Principal Chief of Likhoele; 'Ma-Leshoboro is a daughter of the late Principal Chief of Matelile from the third house of Letsie I.

The issue that arose on Seeiso's death was not so much that of succession as of regency, and the dispute between the late Seeiso's brother Bereng and his senior widow 'Mants'ebo gave rise to the major legal action already referred to. In the event, 'Mants'ebo continued as regent and Acting Paramount Chief until 1960 when the young chief Bereng Seeiso was installed as Paramount Chief Moshoeshoe II. The grounds of judgment are not of direct concern, since they rest upon principles that are not always fully authentic; but some of the circumstances of the dispute raise important and relevant problems. Bereng maintained that the choice of successor (and also of regent) lies with the immediate members of the deceased's family. When they have made their decision, they then summon the surviving members of the lineage next in depth (in this case the Sons of Letsie). Thereafter, the sons of Molapo, Masupha and Majara would be informed. At the meeting at Matsieng, very soon

after Seeiso's death, some effort was made to separate out the Sons of Letsie from the other Sons of Moshoeshoe present, but without success. In the event, the determining role of the Sons of Moshoeshoe was acknowledged, the greater part of them (including all but two of the Principal Chiefs) supporting 'Mants'ebo against Bereng Griffith.

Other issues, of course, entered into the dispute; prominent among these were the question of the lawful role of women (22); the relationship between the senior widow and the heir in public law; the danger of a paternal uncle usurping the throne to himself if appointed regent; the effect of a possible kenelo (leviratic) union between the regent and the royal widow; and others again. Attention has been focussed here on those aspects of the case that bear most directly on the manner in which seniority and succession are envisaged and given effect to. Bereng's claim rested upon his position within the lelapa of the deceased chief. His position within that lelapa determined his high rank among the chiefs of Basutoland. It will be argued subsequently that there is a tension between this principle of seniority, and an alternative principle, where rank is determined by reference to the enduring "cardinal lines" (in terms of which the Chief of Leribe would have the precedence, as the incumbent of the Molapo chieftainship).

The House of Letsie thus provides the line of the Paramount Chief. Second in order comes the House of

Molapo. The complex story of this house can be found in various forms in several sources, and only those aspects that are relevant to the present argument will be recounted here (23). The succession to Molapo and the present structure of chieftainship in the North are diagrammatically presented in Jones (1966: 66-7). What had been Molapo's northern ward now consists of (1) the Principal Chiefdom of Leribe, whose incumbent during the period of research was the late Letsie Mots'oene, heir to the first house of Molapo's senior son Joseph; (2) the Principal Chiefdom of Butha-Buthe, under Kuini Mopeli, heir to the house of Joel, from Molapo's second house; and (3) the (major) Ward of Tsikoane and Kolbere, under Jonathan Mathealira, from the first house of Jonathan, Molapo's second son in his first house (24). Butha-Buthe was formally created a separate Principal Chiefdom by Paramount Chieftainess 'Mantsebo, but as will be seen it had enjoyed largely autonomous status for many years -- in fact, since Joel had defied the authority of Jonathan shortly after Molapo's death. At the same time Butha-Buthe is of lesser rank than Leribe and in certain aspects remains subordinate to the latter (25).

An account of the house of Molapo, and its relationship to the Paramount Chieftaincy, is found in an anonymous account dating from 1928 in the Basutoland Archives in Maseru (26). Internal evidence makes it clear that it is the work of an informed Mosotho of

strong pro-Jonathan sentiments. The following is a précis of this lengthy document:

Précis of "A Resume of the Causes which have led to the Present Condition of Affairs in the Leribe District" (Anon. 1928)

For three years, Molapo, the second son of Moshoeshoe, was (together with his people) a subject of the Orange Free State. After his ransom, he attached himself to his father, and his area (after various adjustments) became what it is now.

Molapo had two principal sons by his chief wife 'Ma-Mosa -- Joseph and Jonathan -- and two by his second wife -- Joel and Mpaki. Joseph as senior was given Butha-Buthe, and the other sons received caretakings too. At a later stage, Joel was given charge of Joseph when the latter showed signs of imbecility.

After the Gun War, when Molapo had died, Letsie I had to come to Leribe to adjudicate a dispute over succession between Jonathan and Joel. He confirmed Joel in Butha-Buthe, but (following Molapo's charge) maintained Jonathan as the senior son and sole successor to the chieftainship of Leribe. Joseph's son Mots'oene had, moreover, been hailed while still an infant as the future Paramount Chief, though of course the succession never went to him in the end (27). Joel, however, did not recognise Jonathan's authority; and this led to the subsequent disputes between the sons of Molapo. The Paramount Chief's people in Matsieng supported Joel, and Jonathan's complaints against Joel's insubordination were neglected. Appeals from Joel's ward went direct to Matsieng, instead of passing through Jonathan. Moreover, in an important area dispute between Leribe and Butha-Buthe, the Paramount Chief's representative (Chief Maama) and the Resident Commissioner overruled Jonathan's decision and made an award to Joel that Jonathan regarded as an invasion of his rights -- especially as he had given the area to Mots'oene as part of his cattle-post. Jonathan claimed that Mots'oene's right extended over the whole of the northern province, whereas his opponents sought to limit Mots'oene to Jonathan's own area. But Jonathan could not resist the pressures against him and had to yield to his junior brother. Matsieng bears much responsibility for this affront.

Jonathan was unusual in having six wives. The first, second, third and fourth had no surviving male issue. The fifth, 'Ma-Tumo, had Tumo, Jan Fick (a lunatic) and Moramang. The sixth is the notorious 'Ma-Tau, mother of various independent

kinglets: Tau and Moshoeshoe (both dead), Majara, Setsomi, Lelingoana and Matlamela.

At one stage, the late Mathealira (deceased son of Jonathan's second wife) became involved in a direct clash with Tau. Jonathan himself favoured Tau, whilst the majority of the chiefs and people were for Mathealira. In the circumstances, Jonathan had no choice but to seek the intervention of the Paramount Chief. The Paramount Chief thereupon drew a boundary delimiting the caretakings of the various sons. This was not the purpose Jonathan had in mind in seeking his adjudication. Moreover, the Paramount Chief's award separated the ward of Jonathan from that of Mots'oene, Joseph's son, although there had been no quarrel between them; and no order was made requiring the subjects of the chiefs to remove themselves into the appropriate areas.

This award was made by Griffith, and Jonathan appealed against it to Letsie II. But the Paramount Chief rejected the appeal. The consequence has been to confirm Tau in his disobedience to Mots'oene and encourage him in his ambitions to become chief of Molapo's area.

As a result, there are three warring factions within the senior house of Molapo: the sons of Joseph, the sons of Jonathan, and the sons of 'Ma-Tau. On top of this, there is the question of Joel himself.

Jonathan's generosity has been met by insubordination, backed up by unfairness and hostility from Matsieng."

This account, partial though it obviously is (28), is illuminating of the role of the Paramount Chiefs, and the occasions which they seized to "interfere" (as one school would have it: "intervene" according to others) in the affairs of other cardinal lines (29). It is significant that the writer regularly refers to "the Matsieng section", treating the Paramountcy as simply one, albeit the senior, of the cardinal lines derived from Moshoeshoe's sons. In a passage omitted from the précis, the writer demands: "Grant him (Jonathan) the same powers as Masupha exercises in his own district or any lesser chiefs like Bereng, Theko and Maama in

Maseru district -- for even a common headman has the right to place his son anywhere in his caretaking without reference to his immediate chief." This author is plainly an advocate of what will be called the "retrospective" principle of seniority: typically, he regards what will be explained as the "circumspective" principle as the result of historical accident, and as a distortion of the authentic Sotho law and custom (molao le moetlo oa Basotho). He also points to what he regards as a sinister alliance between the colonial power (in the person of the Resident Commissioner) and the Paramountcy -- though others (e.g., texts in Germond 1967) took the view that the British authorities were culpable in failing to back the Paramount Chief against the "rebels". The subsequent history of Basutoland, however, makes it clear that on the whole the British administration played an important part in enlarging the de facto power, and ultimately the de iure authority, of the Paramount Chief -- though in this they were not so much creating something new as bringing to the fore one aspect of the political structure of Koena rule that had always been present. In fact, Letsie II was, if anything, a weak ruler. The major extension of Paramount domination took place in the long reign of Griffith (1913-1939).

One of the "contradictions" in the "retrospective" view is also apparent in the anonymous's account: the autonomous rights of the cardinal houses are stressed, but discomfort is felt if the logic of this view is

then extended to any claims made by subordinates within any of these houses. The writer wants Jonathan to display in his own ward the very prerogatives which the Paramount is blamed for exercising in Basutoland as a whole. In fact, within the Molapo wards, this is just what happened. Collateral lines have been depressed, to make way for the advancement of sons (including younger sons) of the reigning chief's own line.

The third and fourth houses of Moshoeshoe's first house will be more briefly discussed. The third son, Masupha, received the ward of Berea (forming most of the administrative district of Teyateyaneng). At the time of the research the Principal Chief Regentess was Chieftainess 'Ma-Mathe, acting for her minor son David Masupha, who has since acceded to the Masupha throne (30). The House of Masupha retains this major ward intact. Though small geographically, it is thickly populated (holding half as many tax payers again as the enormous mountain territory of Mokhotlong), and has most of its area in the (relatively) fertile areas of the Lowlands and Foothills (cf. Morojele 1962).

Of the four senior sons of Moshoeshoe, Majara's legacy has been much the poorest. The Principal Chiefdom of Majara's, ruled in 1964 by Chief Leshoboro Majara, is one of the smallest of the Principal and Ward Chiefdoms in Basutoland, only Kubake's and Likoeneng having fewer taxpayers. Majara's makes up that part of Berea which is not part of 'Ma-Mathe's (Masupha's) ward.

It is now possible to look more generally at the structure of the major chieftainship as a whole. For this purpose, the Principal Chiefdoms of the Taung and the Khoakhwa, together with the Ward of Malingoaneng, will be excluded since they are not Koena chiefdoms. The Principal Chiefdoms of Koeneng and Mapoteng and of Tajane's also form a partly special case, in that they derive from Makhabane and Mohale respectively, who were brothers of Moshoeshoe and thus fall in collateral lines; the same is true of Goliath's ward at Likoeneng (see above note 19), and of a few small sub-wards in Mafeteng and Mohale's Hoek districts. This leaves the following Principal and Ward Chiefdoms:

Butha-Buthe	Maama's
Leribe	Tebang etc.
Tsikoane and Kolbere	Matelile
'Mamathe's etc.	Likhoele
Majara's	Phamong
Matsieng	Quthing
Kubake and Ramabanta's	Qacha's Nek (Ratsoleli and Mashai)
Rothe and Masite etc.	Mokhotlong
Thaba-Bosiu	

making seventeen in all. Of this number, no fewer than twelve belong to the cardinal line deriving from Letsie I, i.e., all except Butha-Buthe, Leribe and Tsikoane (from Molapo), 'Ma-Mathe's (from Masupha), and Majara's (from Majara). The two wards of Tajane and of Koeneng and Mapoteng, deriving as they do from junior sons of Mokhachane (Moshoeshoe's father), are also

subordinate to Letsie's house; and the Taung chiefdom is geographically as well as affinally so closely linked to the house of Letsie as to offer no counterbalance to its primacy. What has occurred has, in fact, been a double process; the imposition of Koena (Mokoteli) chieftainship upon virtually the whole of Basutoland, and within that the largely successful assertion of the "paramountcy of the Paramount" within the Sons of Moshoeshoe. Both aspects of this process must be examined, both separately and in relationship to each other. But first it may be as well to bring out some theoretical features of the principles of seniority and succession that have so far suggested themselves. A Mosotho setting out to determine the seniority of a chief may do so in part by "looking backwards", and identifying the cardinal line through which he is descended from Moshoeshoe. In so far as this respects the structure constituted by Moshoeshoe through his sons, it will be called "retrospective". Since, moreover, "the father never dies" (monna ha a shoele) (31) but lives on in the person of his successor, the four lines simply move forward in parallel lines from generation to generation, never losing their structural relationship to each other or their relative position within the hierarchy. Thus, retrospectively, Letsie Mots'oene of Leribe, as successor of Molapo, was in 1964 the second chief after the Paramount, since Molapo was second brother to Letsie (32). Similarly, David Masupha

became the third chief on his accession, being successor to Moshoeshoe's third son. It is implied in the retrospective reckoning of seniority that Moshoeshoe's sons stand as the founding fathers of a lineage which has a "once-for-all" character. It is essentially non-repetitive, in the sense that it is not open to each succeeding Paramount Chief to start the process afresh by promoting his own sons and so narrowing the Moshoeshoe lineage by reducing it to its own senior segment. When Lerotholi succeeded Letsie in 1891 he did so as the senior member of Moshoeshoe's senior descent line, and Jonathan succeeded Molapo (33) in the north as the senior member of Moshoeshoe's second descent line (though still in the senior house), etc. In the non-repetitive system, it is not open to Letsie to make his second son head of the second cardinal line, to be replaced in his turn by yet a further nominee in the next generation.

The retrospective system thus ideally considered is in tension with a competing system, which will be called "circumspective". But before this second system is examined, a problem must be considered within the retrospective system itself. This arises from the internal segmentation with each of the cardinal lineages, as they bifurcate and divide into subordinate lineages within the major lineage from which they spring. In other words, there is the problem of what to do with junior sons. As will be seen, these were -- and are -- regularly "placed" within the ward to which they were born, in positions (caretakings) subordinate to that of

the senior son but co-ordinate with each other -- or, at least, that is what "ideally" takes place; though in fact cross-winds of political rivalry frequently distort the "ideal" process: and indeed it will become apparent that there are absolute factors as well, notably the filling up of places after a few generations have passed. But this is to anticipate. What emerges at present is that although the retrospective system is "non-repetitive" at one level, it is "repetitive" at a lower level. At the level of the cardinal lines, each line retains the seniority which it derives from its relationship to Moshoeshoe, who set up "once and for all" the cardinal lineages that persist through time in an unchanging structural relationship. But within each cardinal line, secondary segmentations occur, on the model of Moshoeshoe and his sons, so that in the next generation the system repeats itself at a lower level of political structure. This segmentation is in its turn "non-repetitive" at its own level, though in the third generation a similar segmentation and repetition occur at the structural level next below. Each level represents both a grade in the political hierarchy and a generation in time.

The problem that emerges concerns the ranking of the segments in relation to the cardinal lines. A chief in whose interest it is to assess his seniority retrospectively will rank first the senior successors of the cardinal lines in order, passing on thereafter

to the successors of the major segments of the cardinal lines in the same order, then to the minor segments, and so on. Fig. 1 is an attempt to represent such a retrospective system, the order of seniority moving from left to right (senior to junior) and being determined by retrospective distance from Moshoeshoe I. It also illustrates the political and generational levels at which any given sub-system is repetitive or non-repetitive (34).

Political authority is in principle territorially determined in Basutoland (35), the Paramount Chief having authority over the whole territory, a Principal Chief over the whole of his principal ward, a minor chief over the whole of his minor ward, etc. In terms of the retrospective system, therefore, any chief's position in the political structure should indicate not only his social ranking, but also his territorial jurisdiction and subordination. This would mean, for example, that 2b in Fig. 1 would hold a minor ward within the major ward of 2a, who in turn would hold his major ward within the principal ward of 2, who in his turn holds directly of the Paramount Chief. But though the two systems do indeed reflect each other like mirror images in many cases (36) it is at least as frequently found that they do not. The political system departs from the genealogical system to varying degrees. The next step in the analysis is to identify the source and nature of this "distortion", when it occurs.

One important factor was, historically, the legislation introduced by the British administration in 1938. The 1938 Proclamations (commonly referred to in Lesotho as the khubelu, the Red (Book), after the colour of the original) represented an attempt by the colonial Government to rationalise and systematise the complex, cumbersome and imprecise pattern of chiefly administration and justice, as it had come to be in the 1930's as a result of the processes about to be examined. The formal consequence of the khubelu was to place the chieftainship on the statutory basis referred to at the beginning of this chapter, and to provide the Government with enabling legislation permitting the High Commissioner and his agents to implement a series of ancillary modifications into Native Administration as circumstances indicated. (The effects of Khubelu on the administration of justice in the traditional sector are discussed in Chapter Three and Chapter Seven). This is not the place to describe in full or in detail the nature and consequences of the 1938 Proclamations, which have been admirably discussed and analysed elsewhere (Jones 1951: ch. 6; Hailey 1953: 64-112, 130-147); it will suffice to draw attention to certain aspects of this legislation pertinent to the argument in this chapter. (Other aspects will be discussed in the appropriate places.) Two correlative features may be mentioned at the outset. The gazetting of chiefs had the effect of freezing, or purporting to freeze, the

chieftainship in the form and structure, and with the incumbents, it was deemed to possess by the competent authorities at the time the first "recognitions" were issued. Succession was (formally) now dependent on "recognition" by the High Commissioner. Naturally, however, the information on which recognition was based was not gathered directly by him or his staff or agents, but was supplied by the superior chiefs with whom the Resident Commissioner and the District Commissioners had most to do. From this point of view, the 1938 legislation can be regarded as a potent weapon in the hands of the chiefs against their subordinates, enabling them to conscript the whole weight of the sovereign colonial authority behind their selection for gazettelement. By freezing the status quo and prohibiting unauthorised "placings", the Proclamations also tended to support the autonomy of the cardinal lines, and of recognised segments within these, and from this point of view they acted in support of the "retrospective" principle within the upper levels of the hierarchy. But, at the same time, this legislation did much, over the years, to consolidate the position of the Paramount Chief and to give statutory backing to his decisions and administrative orders. In this sense, the khubelu favoured a "circum-spective" principle, as the competing basis of seniority will be called.

Although it is true that the statutory enactments were not necessarily or immediately followed through

into the customary or "traditional" sector, it would be a serious error to suppose that they can be disregarded in a study of the recent and contemporary chieftainship. Though at first not many Basotho were fully aware of the implications of the change, consciousness of what was involved became more widespread as the Government progressively implemented the modifications which it was empowered to introduce by the new legislation. Few, if any, chiefs are now unaware of the importance of the gazette.

But important though the 1938 legislation was, it was a (partly misguided) response to a set of processes internal to the Basotho nation and chieftainship, and it is these processes that are crucial to an understanding of the public law of succession as a whole, and of the "circumspective" principle in particular.

The Koena paramountcy has converted a military hegemony into a political order largely by the use of two linked techniques: a complex pattern of intermarriage, and the appointment or "placing" of the Sons of Moshoeshoe as superior chiefs over other and pre-existing chiefs and communities. The network of marriage alliance among the senior chiefs does not lend itself to discursive treatment and is therefore set out in an appendix (See Appendix III). What may be observed here is that inasmuch as the density of the network and the proliferation of affinal ties sets up a variety of relationships between incumbents of office, there is much scope for

delicately balanced discussion over issues of seniority, depending on how the relationship is traced. Such debates can be further complicated by the problems of both fact and law arising from adoption, kenelo, seantlo, seriti, marriage to the grave, divorce, bohali payments, etc. Most of these factors, and others too, are well illustrated in the long-drawn-out and continuing dispute over the chieftainship of Patlong in Qacha's Nek (37).

"Placing" (ho isa, ho bea, ho nts'a motse) simply means "appointment", but is the word universally used, in English, to refer to the Sesotho practice whereby a chief could appoint a man (normally a son) to a ward or caretaking in his own area. It can refer to the simple act of placing a successor in the place of a deceased or deposed chief, and in this sense there is little to be said; in principle, this successor is the man whom the law points out as the "heir" to the chieftainship. The initial decision and determination is made by the "family", notably the deceased's brothers, whereafter the successor is presented to and accepted by the superior chief (in the case of a Principal Chief, this superior is of course the Paramount). Leaving aside the technical considerations of recognition and gazettelement following the khubelu, such "placings" do not create any disturbance in principle; although naturally disputes may arise over who, in fact or in law, had the better right, in the absence of such disagreement the placing of a successor to a deceased

does not alter the structure of chieftainship, nationally or locally. But "placing" has a sharper meaning too, and often indicates the creation of a new position, usually for the son of a leading chief, and usually above an existing chief of headman (or chiefs and headmen) in his or their own area. The effect of a placing of this kind is to leave formally intact the position of and succession to the chief over whom the new chief is placed, but in practice it depresses the position of the existing chief, and of all the chiefs below. This is partly because a further link is now introduced in the chain of command, and partly because the new chief requires lands and jurisdiction to maintain him, which he inevitably acquires at the expense of the now subordinate chiefs over whom he is placed. The depression of status by the introduction of a new link was noticed above, in the history of Griffith's placing of Seeiso over Lelingoana, the Tlokoa chief, and Rafolatsane, previously placed over the Basuto settlers, both in Mokhotlong (and see Ashton 1938: 319-320; 1967: 201). Appeals from both Lelingoana and Rafolatsane now went to Seeiso, instead of directly to the Paramount Chief. Griffith also, as was the custom, demanded an area (caretaking) for Seeiso's own personal jurisdiction. Mosuoe (Lelingoana) was reluctant to hand over any of his own area; and the dispute continued not only after Seeiso attained the Paramountcy in 1939, but after his death in the following year. In 1944, the Paramount

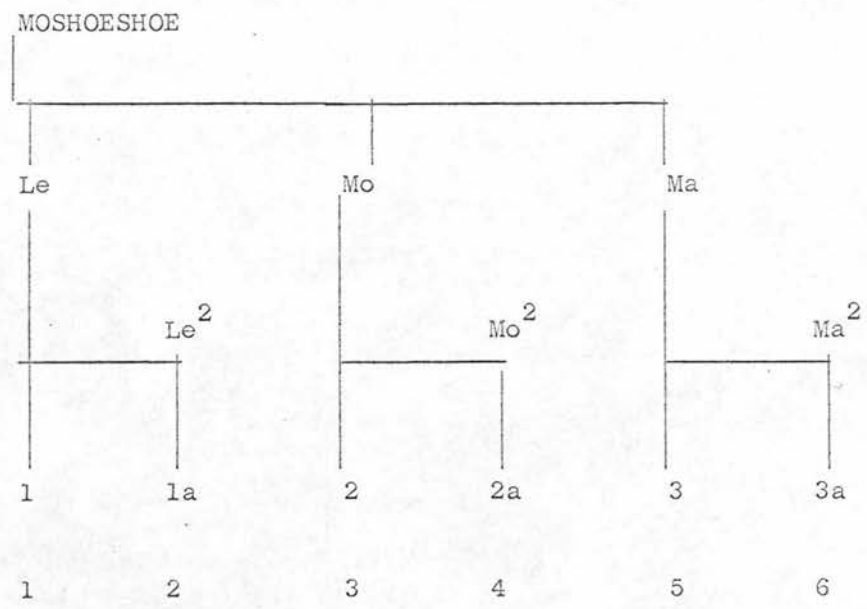
Chief ('Mantsebo) sent messengers to demarcate an area, and the Paramount Chief's court told Mosuoë that "it is the law that when the son of a chief is placed (lit. presented) over somebody, the man over whom he is placed is obliged to make over a caretaking" (38). It is to be remembered, moreover, that before the implementation of the 1938 changes, court fines and tribute-labour (matsema) were important sources of wealth.

Placings were also the means whereby Moshoeshoe and his sons achieved effective political control over the non-Koena groups -- a control which was further strengthened by judicious intermarriage with them. In addition to these general political advantages, the placing system provided a means of securing promotion for those whom a Chief desired to advance or favour, and especially for his own sons or brothers; by placing such immediate relatives, he not only advanced the position of his kin, but also maintained an intimate political link with the group over whom the placing was made (39). Moreover, in so far as younger and junior sons are also placed (rather than simply the heir, who would succeed to the chieftainship in any event), the placing system had the effect of advancing the position of the senior descent line at the expense of collateral lines (40). This process has already been observed in the preceding references to Leribe, and the promotion of Jonathan's sons within the ward. More or less rapid demotion of formerly respectable chiefly families occurred with

great frequency all over Basutoland. Of course, this process served to hold in check the fissiparous tendencies inherent in a segmentary system once a fair genealogical distance has opened between one line and another, with the passing of even a few generations. But just because of this, it represents a tendency incompatible with the ideal retrospective and non-repetitive principle discussed above. The alternative principle implied by "placing" hints at a reckoning of seniority deriving from propinquity to the reigning house of the day: instead of "looking backward", a man can look "round about", and calculate his social position in terms of this other criterion, if it suits him to do so; hence, it may be called a "circumspective" way of establishing seniority in the chieftainship. For instance, in this way of thinking, the Paramount Chief is seen not so much as a Son of Moshoeshoe (implying that the second chief is the heir to the house of Molapo), nor even a son of Letsie or Lerotholi, but (as Bereng argued in 1940) rather as a son of Griffith or of Seeiso, etc. -- the minimal lineage replacing the maximal as the focus of reference. Many Basotho would thus describe not Mots'oene of Leribe, but Leshoboro of Likhoele (41), the elder but junior brother of Moshoeshoe II, as the "second biggest chief in Basutoland" (42). (It will be remembered that Leshoboro is the son of Seeiso Griffith's third house). Similarly, but more feebly, it could be claimed that Letsie of

Fig. 2

CIRCUMSPECTIVE



Phamong, the son of Griffith's favourite and eldest son Bereng, would rank as the "third" chief in the land. Obviously, in terms of the "circumspective" principle itself, claims to seniority couched in terms of proximity to the throne lose their strength as the generations pass. Indeed, it was anticipated that were the Paramount Chief to place his full brother Mathealira at Mokhotlong, the latter would become (for the "circumspective" school) the "second" chief, displacing Likhoele and Phamong (43).

If this principle is expressed in ideal form, it gives rise to the pattern of seniority represented in Fig. 2, where the retrospective reference to Moshoeshoe I and the cardinal lines set up by him "once and for all" have given way to a circumspective reference to the reigning Paramount Chief of the day. Such a system is clearly fully repetitive at every level and would, if realised, result in the "shunting off" into virtual oblivion of all chiefs of other cardinal lines super-numerary to the number of wards available. In fact, this has not happened at the level of the cardinal lineages, though as has been seen it has regularly taken place at lower levels of the chiefly hierarchy, extinguishing or demoting junior collateral lines and advancing the senior house. It has not been politically possible for the Paramount Chief's own line to act invaseively at the expense of the houses of Molapo and Masopha in a similar way (44); nevertheless, the circumscriptive principle can be seen at work in other ways.

Though the Paramountcy has not been able to advance the line of Letsie-Lerotholi-Griffith to the territorial disadvantage of the two succeeding sons, it has secured a preeminent position for itself by other means. In the first place, the multiplication of Principal Chiefdoms within the house of Letsie, compared with the more or less static position in Berea and Leribe, gives the royal descent line a notable preeminence among the twenty-two. As has been seen, twelve of them belong to Letsie as against five from all the other three cardinal lines together (counting Majara). It is true that some of these are fairly small (Ramabanta's, Rothe, Maama's, Matelile and Tebang), but the others are not; and so far as membership of the twenty-two is concerned, one chief's vote is as good as another's (45).

There is probably no way of arriving at a definitive answer to the question of how far the Paramount Chief's authority extends into the internal affairs of the Principal Chiefdoms, and (most crucially, of course) into those of the other cardinal lines. There are as many views on this matter as there are interests at stake; moreover, the stand taken will change according to the circumstances of the case confronting the individual at a particular time. The extreme Paramount and circumscriptive view is that the Paramount Chief can act directly throughout the length and breadth of the land, all other chiefs being merely his local delegates. The extreme separatist and retrospective

view is that the Paramount Chief can act directly only within his own area, i.e. in the wards of which he personally is the Principal Chief, and that anywhere else, and above all in the provinces of Molapo and Masopha, he enjoys no more than a primacy of honour. It is quite clear, for a start, that neither of these views is remotely acceptable as an authentic account either of law or of fact; and indeed few would be heard (soberly) to advance either in quite these forms (46). What is more common is to find the retrospective principle regarded as the only really authentic and traditional law of the Basotho, legitimated by a past extending back far behind Moshoeshoe, and to interpret evidence of the circumspective principle as being a later distortion, the result of historical accident, overweening ambition in the Paramount Chief and others, and improper activities on the part of the colonial power. Conversely, though the advocates of the circumspective principle would not claim as much for it in its ideal form, they argue that the major challenges made to it by the other cardinal lineages, or by lineages within the cardinal wards against the reigning chiefs, are acts of insubordination or "rebelliousness" that have no bearing on the question of right (tokelo) or law (molao).

In the first place, it is clear that the Paramount Chief has traditionally had the right to adjudicate on appeals coming to him from all parts of Basutoland. As will be explained in more detail in a later chapter,

the traditional situation has been altered as a result of the 1938 Proclamations in that "judicial" and "administrative" courts, tribunals, acts and decisions are now distinguished from one another. The Paramount Chief has now no concern whatsoever with "judicial" matters. A transitional phase intervened, however, between the present arrangement and the pre-1938 state of affairs (when no distinction between judicial and administrative existed in the "native" sector). In the transitional phase, the Paramount Chief's courts continued to operate as Appeal Courts from the Native Courts below; none of these courts, in practice, paid much attention to the judicial/administrative distinction, though in terms of the khubelu laws, they were required to do so. For some time after 1938 it remained the practice for the Paramount Chief to "confirm" the decisions of her (judicial) court, and though this was intended to be a mere formality, it was not regarded in this light either by her or (frequently) by her advisers. In a case as late as 1945, the Paramount Chief's court stated that "the Paramount Chief has the authority to cancel or confirm or alter any judgment as she sees proper (... o na le matla a ho fokotsa kapa a ho tiisa le a ho eketsa kahlolo efe kapa efe...)" (Lerotholi v. Monyoe J.C. 189/45). Though such a view ran flagrantly counter to the official policy of Government, and though the particular expression of it in Lerotholi may be regarded as somewhat extreme, it illustrates an important

feature of the traditional powers of the Paramountcy (47).

In administrative matters, such as the adjudication of boundaries and the resolution of area disputes between chiefs or their followers, the Paramount Chief also traditionally enjoyed a special authority, within other major wards, including the cardinal houses themselves. The history of the Molapo ward earlier in this chapter provides several instances of this (48). Since disputes over boundaries and areas are of very great frequency (and always have been), the Paramount Chief's role in these matters is one of outstanding importance. It remains true, however, that it is idle to attempt any pedantic definition or circumscription of his traditional "rights" in any abstract sense, since what he can ("politically") do and what he is entitled ("legally") to do are intimately related. The "law" of Paramount rights has grown out of the interplay of local and central forces and out of the dialectic of "retrospective" and "circumspective" claims. There are at least two views on any particular issue, and neither can be regarded as a definitive statement. For example, an act by the Paramount Chief might be interpreted as evidence of his "right" to act as he did, or simply as a successful but "illegal" initiative; and out of this initiative, a new concept of legality can grow (49).

In recent times, the position changed as a result of legislation. In 1959, the College of Chiefs was

established, and all disputes arising from chieftainship were thereafter handled in terms of this body and its rules. Under the Rules of the Standing Committee, the Paramount Chief was empowered to consider its findings and if satisfied to make a "final decision" in the matter. This legislation represented a policy of withdrawing the adjudication of judicial claims to areas and jurisdiction from the judicial courts, while providing a more formal and constitutional process for decision-making than existed in the administrative tribunals of the chiefs. It was not the intention that the Paramount Chief should act directly in the matters that came before the College, though his ultimate right to make the "final decision" was preserved (50).

A similar story can be told of the Paramount Chief's rights in relation to land (considered now as the object of a "usufructuary" rather than as an "administrative" title, in the terms of Sheddick's distinction -- Sheddick 1954: 7-12). Land law is specifically considered in Chapter Five, only the relevant aspects being referred to here. The Paramount Chief is the ultimate "owner" (mong) of all the land in Basutoland, and cases or disputes involving land allocation, deprivation and occupancy can in the last resort be appealed to him; this represents the traditional law. Since the separation of judicial from administrative affairs, following the 1938 Proclamations, this has meant an appeal through the chieftainship administra-

tive courts (makhotla a puso) to the Paramount Chief -- together with his advisers -- himself (51). The observations on the impropriety of the Paramount Chief's intervention in judicial matters do not apply here. Under more recent practice still, questions of land allocation have been set on a more formal basis, with a series of land authorities hierarchically organised, but with an ultimate appeal to the Paramount Chief (see Chapter Five). These modern changes, however, have done little more than formalise and render more "visible" procedures that are, in the relevant aspects, traditional and customary.

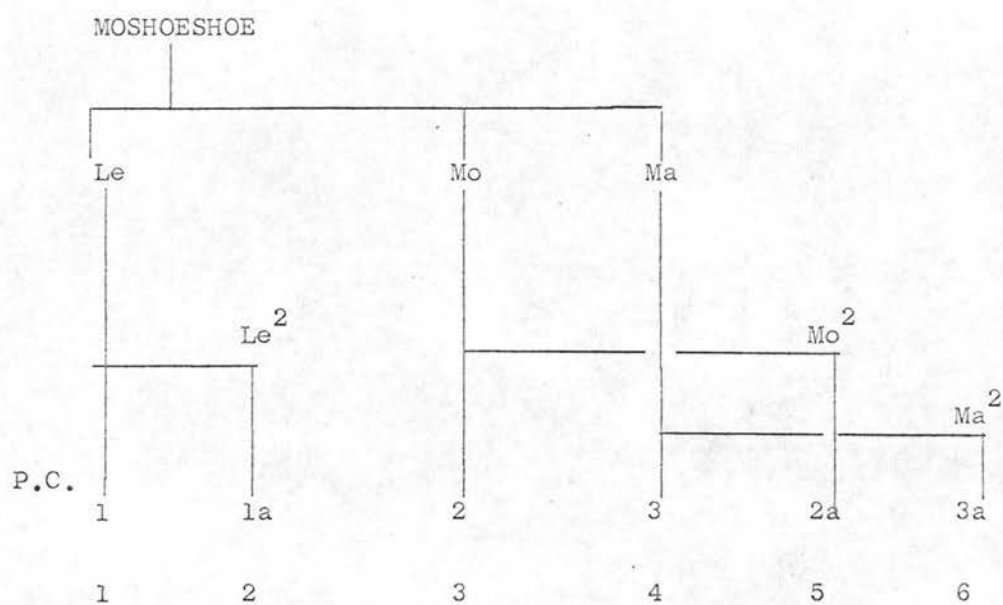
The special prerogatives of the Paramount Chief in relation to maboella (grazing) have already been noticed, though here as elsewhere it is the law that he should act through the lawful chief of the area. The problem arises when the chief fails to obey the Paramount, and it is of course in this situation that the most vexatious difficulties are presented. Every chief should act through his immediate subordinate, just as a subordinate can approach the top of the hierarchy only through his immediate superior (see Chapter Four). It would not be proper for the Paramount Chief to short-cut the chain of command by issuing an order directly to the subject of a chief, especially in another Principal Ward, and especially in the area of one of the other cardinal houses. Of course, a refractory immediate

chief opens himself to disciplinary action, but here again there is no simple and unambiguous distinction between "political" fact and legal "right". Subject to these reservations, however, the (lawful) orders of the Paramount Chief must be obeyed; this applies to all chiefs, but has especial force in the case of the Paramountcy.

The Paramount Chief also has the customary power forcibly and directly to remove a subject who declines allegiance to his territorial chief (52). (This is the offence of "turning the door of the hut" (ho reteletsa ntlo monyako) and is a traditional offence.) This could be done "without a case", though today it probably can only be effected through the courts.

As has been observed in other connections, the advance of the Paramountcy to pre-eminence has at times been greatly assisted by the British colonial administration. In 1938, Paramount Chief was empowered to issue both Rules and Orders, with statutory effect, and a considerable volume of subsidiary legislation, much of it of considerable importance, has resulted. Parts II and III of the Laws of Lerotholi in their modern revisions consist of these Rules and Orders respectively. Though these are, of course, recent innovations in the particular form they take, it seems proper to regard them as another stage in the successful advance of the Paramountcy to a position of administrative preeminence of nationwide scope. From one point of view, they show how the

Fig. 3

MIXED

Paramount Chiefs conscripted the British authorities into supporting their claims to an ever wider and more effective authority over the whole territory.

These, then, are the effective general dimensions of the central, "circumspective" power of the Paramount Chief, so far as it is possible to delineate them. Like the "placing" system, they tend to depress the claims of subordinate and collateral lines, and like the placing system again, they have not proved so dominant as to offer any real threat to the integrity of the other cardinal lines. The political realities of the cardinal lineage structure and its effective legitimation "retrospectively" determine the limits of the "circumspective" principle and of the claims or pretensions of the Paramountcy. The effective seniority system (the "empirical" as opposed to the "ideal") can best be described as "mixed", giving rise to a partly retrospective and partly circumspective system such as is formally and schematically suggested in Fig. 3 (53).

The two principles of seniority determination are thus not fully compatible, yet their degree of de facto coincidence is sufficient to permit them to coexist without disturbing the political structure unless the two systems come into conflict at a point where important interests are threatened. At such a point, a decision between the two systems, or a compromise capable of interpretation in terms of either, must be found. Many Basotho adopt (at least in theory) the circumspective

principle, and many the retrospective; but the actual ranking suggested in practice will be found to correspond to neither. When the inconsistency is pointed out, the discrepancies between the theory and the actual ranking produced will be accounted for (perfectly correctly at one level of analysis) in terms of historical or other accidents. The empirical situation will generally be described in a similar way by all local observers, but will be interpreted according to one view of seniority or another, the choice being only occasionally determined by whether the speaker will tend to gain from the theory he adopts. But from whichever standpoint of the two the empirical situation is initially approached, the "accidents" themselves can be viewed as generating the alternative principle, and that is the analytical method that has been pursued here. Each principle exists as a descriptive item in the field. The tension between them, and their coexistence, and the duality of the system of seniority determination are, however, analytical concepts and do not exist 'on the ground'.

The retrospective principle permits a structural and administrative continuity, in terms of both the political and the kinship systems, in that it envisages a continuing hierarchy, persisting territorially and in time, and conforming to patrilineal descent groups, which makes possible an exact and unambiguous reading-off of any individual chief's position, once his relationship to Moshoeshoe I is known. Such continuity

could not be achieved in a system which gave each succeeding Paramount Chief the power to "start afresh", nor could such a system be accommodated to the kinship institutions and the general law of succession, both of which are effective throughout Sotho society.

The retrospective system reaches its terminus ad quem only when lineage segmentation has produced (by lower-level repetition at generation intervals) so many candidates for position that further jurisdictional subdivision ceases to be feasible. The lower levels of the hierarchy are then easily 'shunted off' into commoner status by applying the principle of primogeniture to exclude younger sons -- i.e. at this level, the system becomes "purely" retrospective and non-repetitive. Younger sons of chiefs are frequently in this position. From this point of view, the placing system is an acceleration of the 'shunting off' process, applied circumspectively by the Paramount Chief.

The retrospective principle, since it takes Moshoeshoe as its point of reference and ranks seniority in terms of cardinal lines, indicates, and indeed by its logic implies, the primacy and seniority of the Paramountcy, yet at the same time it maintains the localism of chiefly government, which is an inescapable necessity of administration in a territory of nearly 12,000 square miles and more than three-quarters of a million resident inhabitants, where communication is rendered slow and difficult by the mountainous and in

places almost inaccessible terrain.

The conceptual unity of the chieftainship in Sotho consciousness is a fact of ethnography. It can be incorporated into this analysis in terms of both principles of seniority, each of which represents the one borena as existing on different levels and in different degrees; but whereas retrospectively considered the source of this "diffraction" lies in Moshoeshoe I, or rather in his institution of the cardinal lines, circumspectively considered, it lies in the Paramount Chief as Moshoeshoe's successor. Yet the process of lineage segmentation, central to the retrospective system, threatens this unity by producing (as it has in fact produced) a tendency to separatism as the descent groups move away from each other. The circumspective principle holds this tendency in check by relating seniority to the Paramount Chief in person and authorising him to override separatist forces, while at the same time a retrospective counter-reaction prevents this process from converting the hereditary chieftainship into an ad hoc bureaucracy. In this way as in others that have been noticed, the retrospective system tends to represent lineage authority, the circumspective to represent chiefly power (54).

The circumspective focusing of attention upon the living Paramount Chief also centralises administrative control in him; the balance between this centralisation on the one hand and the localism of chiefly government

on the other makes possible a system which respects kinship and succession without permitting segmentary anarchy, and maintains the political unity of the nation in a manner obedient to, and moulded by, the facts of Basutoland's topography.

The circumspective principle runs into the ground when the assessment of seniority by reference to the Paramount threatens the essential interests of the other cardinal lines, especially where new placings are involved. It is at this point that the interplay between the two principles brings about the situation represented in Fig. 3. This "mixed" system can perhaps serve as a more accurate model of Koena chieftainship than either of its two analytically pure rival constituents; the analytical separating out of the constituent models illustrates the political functioning of the mixed system to advantage, by clarifying the separate features of each of the conceptual schemes that underpin it. But whereas each of the two constituent principles is susceptible of legal formulation, their resultant, the "mixed" system, has not been so formulated or defined. It only attains visibility at points of tension between the retrospective and circumspective criteria -- in other words, at points of choice and decision, which is precisely the domain of politics and not of law (55). The logical tension (or balance) between the two principles of seniority determination is the context in which certain political oppositions are expressed, and

although the oppositions can naturally only be resolved politically, that resolution can be legalized in terms of either the one principle or the other. The two find their point of coincidence in Moshoeshoe, whose ambivalent position -- founder of the "once-for-all" fraternal lineages; or else pattern for subsequent chiefs to repeat -- is the model of the other ambivalences and ambiguities detected in the political system, and enables any empirical decision to be explained and justified by reference to him.

CHAPTER THREE

Chiefs and Courts (1)

Basutoland and the Basotho are well-known throughout Southern Africa for the number of their chiefs. It is a matter for banter among other southern Bantu peoples, in the Republic and in Swaziland and Botswana. At a time when the population of Basutoland was estimated to be about 800,000 (including absentees) the number of gazetted chiefs was rather over 1,100. (In Swaziland, with a population of about half, there were fewer than two hundred). Moreover, many people whose names do not appear in the gazette are also commonly known as chiefs. There are something in the order of 5,000 villages, where the headman receives the title of morena, and many junior sons affect or are accorded the style. As was seen in Chapter Two, this proliferation of "chiefs" must not obscure the sharp hierarchical stratification within the chieftainship as a whole. The twenty-two so-called "Principal and Ward Chiefs" are in a very special category. Of the remaining gazetted chiefs, about 650 are headmen, of whom only about sixteen have other junior gazetted headmen under them (2). Of the remaining 450 or so gazetted chiefs, about 100 can be considered major chiefs, taking as an operational definition of this category that a major chief has at least two gazetted jurisdictions subject to him, and

that he is himself directly subject to his Principal Chief, unless he has three or more such subject jurisdictions, in which case he may be subject to another chief. Thus, the number of chiefs of substantial position is small. The special feature of the Basotho is that they nevertheless use the title of morena very freely, and have little use for any formal terms distinguishing one category from another. The terms morena oa sebaka, literally "chief of a ward", and morena oa sehlooho, "head chief", are used in formal contexts or where the rank must be clearly specified. Otherwise, the name is used alone or in conjunction with the ward. Basotho are familiar enough with the ranks of the major chiefs not to need any more detailed specification. At the other end of the scale, a headman is officially a ramotse, literally "father of the (a) village", but such a person will also be addressed as morena on suitable occasions. Ramotse is more the name of an office than a form of address. The term morenana "chieflet" or "chiefling", is normally used jocularly or depreciatively though it can also be used as a formal description; but it would not be employed as a form of address (an English equivalent used teasingly in some circles is "sixpenny chief"). Morena is itself used as a term of respect to Europeans, and indeed to any stranger who appears to deserve or command it. Conversely, the term ntate, which is the ordinary form of address to a man (corresponding to feminine 'me'), is used in speaking to chiefs in

informal contexts without any disrespect; it is indeed used to the Paramount Chief (3). (A chieftainess, including the wife of a chief, will also at times be addressed as ntate, when in fact it carries a particular note of respect.) Khosana, really a Nguni word meaning "prince", is used to refer to a chief on occasion, particularly to the heir to a major chiefdom. As noted in the preceding chapter, the term Motlotlehi has been brought into use as the particular title of the Paramount Chief, equivalent to "His (or Your) Highness" or "Majesty". The relatively unstructured character of "chieftainship terminology" should not, however, be allowed to obscure the keen consciousness of differentiation of rank with which the Basotho view the hierarchy. No Mosotho would class the Chief of Leribe in the same category as a sub-chief or headman; nor again would he regard the Chief of Leribe as of the same rank as, say, the Chief of Ramabanta's, simply because they are both now officially "Principal Chiefs" (unless, of course, the person involved adopted a particularly and in this case eccentrically "circumspective" index of rank). Basotho, in fact, use the title morena rather loosely, but this is no indication of any substantive looseness in their view of actual chiefs (4).

In one sense, Basotho have traditionally accorded great respect to chiefs, and most continue to do so. They tend to regard chieftainship as a mark of tribal self-respect and to look with pity and contempt on a

man without a chief; and it is, of course, the fact that Basutoland has developed, politically and administratively, on the basis of chieftainship, in ways that are specified elsewhere in the current study. This is allied to the simple recognition of the political and tenurial reality of the institution, so that a man is wise to show respect to the chief of his area, no matter what his sentiments may be. But sentiments are not, at least outside the urban or semi-urban areas, in any real sense at war with interests (5). At the same time, Basotho are not servile in their attitude to chiefs, even the most senior. They will talk with great informality, even cordiality, in a manner that they continue to combine with respect. It is not always easy for a stranger to tell the rank of someone met on a road or path from the way in which he is greeted by a companion. It may be clear that he is some kind of chief, from the words used, and the fact that it may be hard to learn more without direct information can mislead the observer into misunderstanding the attitude of the Basotho both to the chieftainship as a whole and to its internal differentiation. The difficulty is aggravated by the formal courtesy which all Basotho normally display to each other (friends or strangers) when they meet. Comparatively lengthy exchanges of greetings are conducted with any person who is met along the way, and the stranger might mistake for marks of great deference the warm thanks that are proffered in return for the stereotyped inquiries after

the other's health and well-being (6).

Although such factors as land shortage, the introduction of a partly money economy, and a changed political consciousness on both sides have modified the "actuarial", they have not undermined the "moral", expectations of chieftainship, nor rendered irrelevant the sort of characterization of the office and the office-holder that have been traditional in the nation (sechaba). It will be recalled that in Chapter One, reference was made to the stem - ren- (as in morena) as implying wealth. A chief is assumed to be richer than a man who is not a chief, and traditionally this meant that no one was supposed to rival his chief in wealth. Cattle being the principal form of wealth, they have a special significance for chiefs. A traditional greeting to a chief is to call, "Khomotseo, morena!" ("Those cattle, chief!"), with the reply or addition of "le manamane a tsona" ("and their calves"). Chiefs had a traditional monopoly of cattle, as is suggested by the saying, "khomo, 'muu! Sellamoreneng, metsaneng ea ronana" -- "Moo! goes the cow; she lows in the chief's place, and is out of place in the small villages". Chiefs, however, would lend cattle out to their subjects (mafisa), retaining ownership but letting the borrower use the milk and dung and having any beasts that died naturally. A subject with a herd so large that it might attract the jealousy and enmity of the chief or of his neighbours would mafisa many of his stock

to others. (The practice of mafisa is still, of course, very widespread in Basutoland, though other functions have overlaid without eliminating the former motivation (7).) Chiefs, on the other hand, are proud of their herds, and large numbers of cattle are taken as bohali when a chief's daughter marries (in chiefly marriages, the bohali is preferably of fifty head, usually of actual stock, rather than of a cash equivalent or other substitute, and is normally paid at once instead of by instalments). Even today, it is an awe-inspiring sight to see the Paramount Chief's sea of cattle being driven through the royal village of Matsieng back to their kraals in the evening.

Chiefly wealth is often real enough in modern terms too, and several principal chiefs are moderately rich men by any standard (8). But whereas there was little that could be done with traditional forms of wealth except, in the familiar phrase, to use it to build up "social capital", chiefs no longer have to spend their money in this way. Many chiefs use their liquid resources to buy large American cars, and to indulge freely in expensive food and liquor. Since their sources of revenue are now largely independent of the communities over which they rule, there are fewer popular sanctions that can be mobilised against their defection from the traditional chiefly virtues (exaggerated though these may be in contemporary consciousness). Of course, traditionally as today, chiefs lived

better than their subjects, but the difference was quantitative rather than qualitative. They ate meat more often, and consumed the better cuts; their huts were larger and more numerous, better built and with better accommodation; above all, they had more wives. But there was no radical discontinuity between their general manner of life and that of their subjects.

Demographic changes have also played an important part in changing the relationship between chiefs and people. As seen, it was formerly possible for subjects to move from one chief to another, and in the early days of expansion there was even some competition among chiefs to secure followers. The increase in population has caused a greater pressure on land resources and thus critically altered the balance between the subject seeking land on the one hand and the chief as land administrator on the other.

These developments have coincided with and to an extent been shaped by the rise of a modern political consciousness. The best accounts of the recent political history of the territory are Halpern 1965, Spence 1968 and Weisfelder 1969; see also Hamnett 1966a. The principal event was the rise of what became the Basutoland Congress Party (B.C.P.), a radical nationalist group equipped with an able leadership which rapidly gained very wide popular support for its militant, anti-colonialist and (in effect) anti-chieftainship policy. The relevant effect of its intervention was to impel the

chieftainship, or a wide section of it, into an alliance with the colonial authority of a highly qualified and ambivalent but nonetheless effective kind. The principal agent mediating between the chiefs and the government was the Marematlou-Freedom Party (M.F.P.), which enjoyed or was said to enjoy the support of the Paramount Chief (who certainly exercised his rights of nomination very largely in favour of M.F.P. supporters). Another group of chiefs, consisting to a significant extent of those who were hostile to the Paramount for reasons other than those of "modern" politics, were joined together in Leabua Jonathan's Basutoland National Party (B.N.P.), although at the time this party played only a minor role in visible public life. The B.C.P. won a convincing victory in the (indirect) elections held in 1960 under the new constitution, but in the Legislative Council they were weakened not only by defections from their ranks but also by the non-elective element in the membership, which assured an easy majority for the government front bench. The relevant effect of this situation was to render the chieftainship, in one aspect still the unique and "total" governing institution in the nation, in another aspect no more than one limited group competing with other limited groups structurally equal to and co-ordinate with it, with clear implications for its continued legitimacy and for its claims to represent a "national" as against a partial and partisan interest (9).

The ideal chiefly virtues are those of generosity,

fatherliness, hospitality and (much more ambivalently) strength. The proverb (or more accurately, riddle) "sefate se luloang ke nonyana tsohle? - ke morena" ("A tree on which all birds sit? - A chief") illustrates many of these features. A chief is expected to give rest, hospitality and shelter to all, and to be strong enough to support all the many who depend on him (10). In Kekane v. Makhorole J.C. 11/60, the Paramount Chief's Court (in a judgment delivered in 1934) instructed headman Thakamakula: "chief, there are your children - see to them and give them lands when they come humbly before you.... They live with you and help you and work for you." In Koali v. Sebolelo J.C. 4/44, the Paramount Chief's Court rebuked Chief Molapo, saying "You are the chief of orphans, but today I see that you are their destroyer (moghali, scatterer)" and reversing his allocation; and shortly after, in Letsoela v. Coronelis J.C. 67/44, the same court told a chief, "You are the protector of widows and orphans, and I find that you have betrayed your duty and used the powers you possess wrongly." An accused person relied on this general conception of chiefly obligations to justify his refusal to join in the work of ploughing the chieftainship fields: "I work and yet he does not feed me.... It is only right that when he issues a call to the work-party (a meme letsema) he should give us food.... It is known that a chief should feed the people." Although on this occasion the Paramount Chief's Court did not support

the defendant, the cry "I work and yet he does not feed me" (ke sebetša a sa m~~ma~~fepe) is eloquent of the reciprocities that he saw as morally involved ('Matli v. Letsie J.C. 4/49).

The might of chieftainship, its greater strength than the strength of ordinary people, which enables it to bear the weight of so many social responsibilities, is, as has been suggested, more ambivalent. Most proverbs and sayings that reflect this aspect of chieftainship have either a menacing or a cynical ring: ntsoe la morena le haheloa lesaka (the word of the chief builds a kraal, i.e., the chief's word is powerful and is obeyed); morena ha a tene moluopo (a chief does not wear a moluopo (a kind of loose loin cloth), i.e., he is never badly dressed -- he is never wrong); morena ke khomo e chitja (the chief is a hornless cow, viz., he is unpredictable); ke naleli e tlasa khoeli (he is a star below the moon -- said of a chief's letona, or counsellor); matsoho a marena a malelele (the chief has a long reach); morena ha a ts'oele, oa bolaea (a chief does not put in the second blow, he is the killer; ho ts'oele is to be the second person to strike an animal or prey, hence to be an accomplice or assistant; the proverb signifies that a chief gets the credit for and the profit from what his subject does) (11).

Chiefs have traditional powers to issue orders. Today, they retain the power to issue "lawful" orders, and if these are not obeyed, the chief may prosecute, so

that the "lawfulness" of the order may be tested in court; but formerly, of course, when the distinction between administration and the judicial courts did not exist, the chief enforced his own orders "without a case" (Motsie v. Borena J.C. 44/57). It was easy then (and as will be seen is not difficult now) for a chief to "eat up" a recalcitrant subject, by fining him, dismissing his suits, impounding his cattle and taking away his fields. A wise Mosotho hesitates before incurring the enmity of his chief.

Chiefs constitute the network whereby the government and administration of the country are carried on. The Paramount Chief communicates with the whole territory by sending letters or messengers to the Principal and Ward Chiefs, who then pass the instruction or notification to the subordinate chiefs, and so on down the hierarchy until each village and homestead has been informed. A special occasion warrants the holding of a pitso, or meeting (~~M~~uch commoner in the past than now), at which the communication is delivered to the whole community, and a pitso may be a rally for all the people over a wide area, and even nationally. But day-to-day and week-to-week administration takes a more routine form, and is conducted through the whole body of chieftainship in its widest sense, concluding at the level of the village phala, or herald. Chiefs can order a subject, or a subordinate chief, to attend them, so that important questions can be discussed face-to-face without the use

of messengers. Much business is conducted in this way by the Paramount Chief and his officers both at Maseru (the modern capital) and Matsieng (the royal village), and equivalent activity goes on in the principal wards and below. Considerable use, however, is made of representatives and messengers (magosa, sing. legosa), who should command the respect due to the chief, and yet not incur blame for bad news. As the proverbs put it, legosa la morena ke morena (the chief's messenger is the chief), and legosa ha le na molato (the messenger is not to blame). But in fact messengers are often much more active agents than this suggests. The chief's messengers often act in the place of (bakeng sa) the chief, and are charged with decision-making functions: to investigate a dispute or faction-fight and take action on the spot, or (very commonly) to inspect an area and determine a boundary. It is obvious that the Paramount Chief (whose special role in the matter of boundaries has been noted in the preceding chapter) cannot usually appear in person, and before the quasi-judicial procedure of the College of Chiefs was introduced in 1959 (12) it was the regular practice both for him and for other chiefs to rely upon their representatives (13). No qualitative distinction existed between the act of making a decision and then sending messengers to execute it, and the act of sending messengers to make a decision. It follows, more particularly in the latter cases, that the word "messenger"

does not necessarily imply a lowly status. In major matters, the messengers will be people of great seniority themselves (cf. the Paramount Chief's interventions in the Molapo disputes through his "representatives", who include Chief Maama and Chief Griffith: see Chapter Two, precis of "Anonymous of Leribe").

Modern government also makes extensive use of the chiefly administration, and in fact could not function without it. The link is provided by the Local Government Department, which communicates with Principal Chiefs and, in the normal case, with their subordinates through them. District Commissioners also communicate with their Districts through the chieftainship. No other serviceable form of local administration in fact exists. The District Councils, established in 1948 and reformed in 1959 and at subsequent dates, were less than effective, being often over-stretched in their duties, and occasionally even disruptive (14). Native tax, later Basuto tax, is also collected through the chiefs, and in fact many Basotho regularly describe their allegiance in terms of the chief through whom the tax is paid.

Chiefs are also both empowered and required to act as law enforcement officers, making use both of their traditional right to have their orders obeyed and to preserve the peace, and of their more modern power to prosecute offenders for criminal acts (which, of course, include disobedience to orders). They arrest and

detain alleged offenders, prepare evidence, and present the accused before the judicial court for prosecution.

As has been noted, until the 1938 Proclamations, chiefs held their own courts. Under the new legislation, they could do so only if they held a court warrant, and although in fact all the 1,340 gazetted chiefs received such warrants, the principle was established that it was not chieftainship but administrative recognition that bestowed the right to a court. The de facto coincidence of the two, however, disguised from most Basotho the change that had been introduced, and the actual situation continued with little structural change until after the war (15). In 1946, warrants were issued to 121 Chief's Courts, and the figure dropped to 106 three years later. At the same time, Chiefs and judges (court presidents) tended less often to be the same people, and it became the practice of government to continue this process and hasten it. Court presidents were less often subjects of the chief in whose area they sat, and though Chiefs were frequently appointed as judges (being often the most suitable persons) they were deliberately placed in courts outside their jurisdictions; even the boundaries of court areas no longer necessarily corresponded with those of the chieftainship wards. The disjunction was emphasised when, in 1958, the appeal courts at Matsieng, the royal capital, and the peripatetic courts of appeal attached to Matsieng, ceased to act as national courts of appeal and became simply courts

of record for the Matsieng area (16).

However, the 1938 legislation, and the subsequent modifications and implementations of it, neither struck nor intended to strike either at the "administrative" aspects of chieftainship (except in so far as only gazetted chiefs retained administrative power in the eyes of the government) nor at the freedom of chiefs or their counsellors and representatives to hold makhotla a tlhopho, courts of arbitration. Detailed consideration will follow concerning the general "administrative" powers still left with the chiefs and the "administrative" courts (makhotla a puso) associated with these powers. But at this point it is relevant to stress the role in what might be called the "ordinary" process of justice (both civil and criminal) which these courts of arbitration, and the chiefs themselves, have continued and still continue to play.

The lowest level of lekhotla la tlhopho represents the continued existence in partially non-recognised form of the lowest level of former chief's court. In so far as cases are remitted from it to what are now the administrative courts (makhotla a puso) of the chiefs, the system that existed before the 1938 legislation still exists. But, in fact, cases of every sort appear before the lekhotla la tlhopho, and not just those that are appropriate to the administration. It acts, in fact, as a clearing-house for disputes and other matters, where chief or headman or his deputy, together with his

Fig. 1

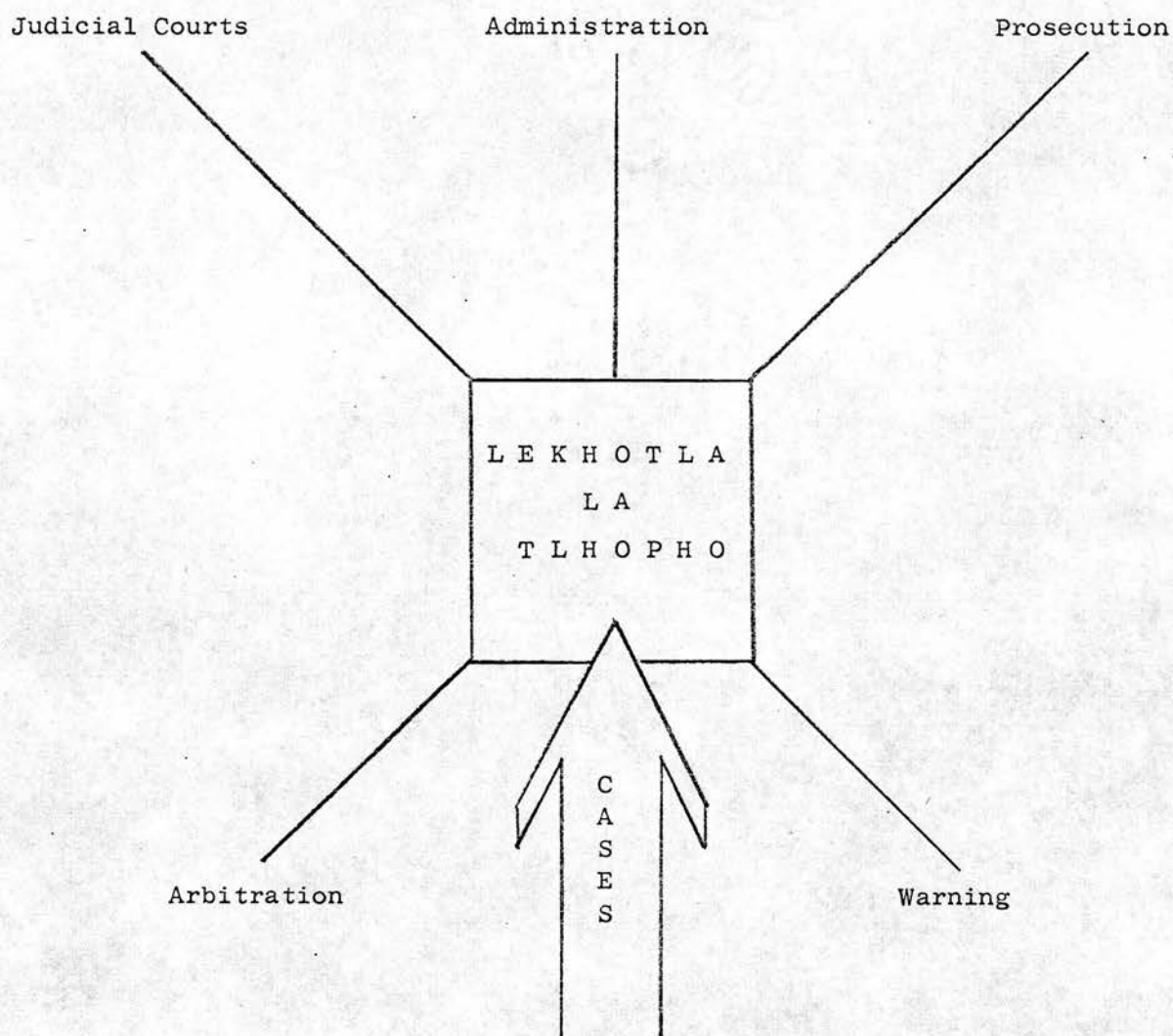


Fig. 1

The "Lekhotla la Tlhopho" as a clearing-house

advisers, can decide upon what action to take next, act as arbitrator between disputants, or offer advice to an aggrieved subject who wishes to vindicate his rights (or what he conceives to be his rights). There is a wide variety in the assiduity and conscientiousness shown by chiefs and headman in their running of the lekhotla la tlhopho. Three villages at Mofoka in the ward of Matsieng are superintended by Peete Mofoka, younger brother of the gazetted chief Lehlola Setenane. Peete is not himself gazetted, but he acts as a headman under his brother, whom he will succeed in due course. Peete sees it as his task to channel complaints and disputes that come before him into the proper routes. Some are criminal or quasi-criminal, and with these he exercises a discretion whether to present an offender for prosecution, or whether to issue a warning. Chiefs can require a subject to live under their eye to check on their good behaviour (ho ropa, literally "to tether"). In the case of offences which would not in themselves constitute a crime in the eyes of the imported law, naturally no question of prosecution would arise (17). Non-criminal matters might be suitable for administrative action, in which case the aggrieved person could either have his problem corrected by the chief or headman himself or he could take the matter to the administrative court of the senior chief. Other administrative matters would be the concern of the organs of modern government, and Peete, as an ex-policeman, is quite equipped to advise a complainant to which official he should take his problem

or request. Other civil matters might be suitable for the judicial courts, in which case Peete helps the disputant with the procedures connected with "opening the court" and preparing his case. He regards himself as bound to perform a similar service for both or all disputants in a case, seeing his function as being that of an impartial adviser. But the majority of disputes are settled in the lekhotla la tlhopho and the judicial courts are not invoked. The fee of five shillings payable on "opening the court" acts as a deterrent against much litigation (18), and goes some way to explaining the success which Peete met in reaching a successful settlement within the village (19).

Peete is aware of a litigant's right to "open the court" himself and knows that his own position is an advisory one. But few Basotho believe this. They believe, in nearly all cases, that they cannot open the court without the mediation and authority of the chief (20). In Masite Nek, all disputes came before Ramakau (the chief of Masite), having sometimes been considered even more locally by the village headman Chitja. But Chitja only hears small cases, usually involving family matters and homestead disputes (litaba tsa lelapa); and in fact these are mostly handled on his behalf by Radebe, in his capacity as phala. There is no reason in principle why this should be the case; but Chitja is neither young nor very forceful, and is not in any case particularly interested in the more onerous aspects of his office.

Now that he is gazetted, he is anxious to have a pound of his own, but this is more because he feels that it is owed to his position (and because of the share of the "fines" he would expect to get) than because he takes his chieftainship very seriously. In fact, he lets Mahlaku, the shop-keeper, and others use his own personal lands and spends a large portion of the proceeds on beer at Mahlaku's drinking place. He is one of the less prosperous of the inhabitants of Masite Nek, and not one of the most respected. He has a legitimate grievance, in that Ramakau, the Chief of Masite, is a young man who (as has been mentioned) was sent to be "bought up" by him but who was then promoted over his head. (It will be recalled that Ramakau is a junior member of Mohlalefi's lineage, his father Mokhalinyane being a junior half-brother -- from the fifth house of Sekhonyana -- to Mohalefi's father Bereng.) A comparison between Chitja at Masite Nek and Peete at Mofoka's shows how far chieftainship can be what the individual makes of it, or what his age and position enable him to make of it (21). If Ramakau cannot solve the dispute -- if it proves too "hard" (thata) for him -- then it proceeds to Rothe and is considered further by Mohlalefi's local administrative court. (Mohlalefi does not usually attend, except where a boundary dispute is involved, or where the matter is of great importance. But he will sometimes interfere if he does not approve of the way his counsellors are conducting the case,

speaking privately to them and pressing his view of the matter.) If the case proves too "hard" for the Rothe lekhotla la puso (22), it will be sent to the local judicial court. This happens to be at Rothe also, but is a quite separate building, and its president and clerk live in publicly provided houses tied to their positions, over which Mohlalefi has no formal control.

Area disputes, or "administrative" appeals concerning land, can go to the Paramount Chief's administrative court or to the College of Chiefs (in the 1959 Constitution) but "judicial" matters are not considered beyond Rothe in the hierarchy of makhatla a puso. From Rothe "puso" they pass to Rothe Local, and from there to the Central Court, which in the case of Rothe happens to be at Matsieng (see note above).

A case of night-grazing (Masite)

Thabo's wife is Selina, and they have an unmarried son, Ts'epo, and two unmarried daughters. Thabo is a rich man, and has twenty-nine cattle, all his own; none of them, at least, are known to be mafisa'd out to him by others. In summer, all his cattle (except one cow that he keeps at home for milk) go to the leboella in the mountains. They go in a group of about fifty, joining up with the herds of other villagers, and are driven by two young herdboys (balisana). The cattle post (motebo) is about two days' drive away. Thabo's son, Ts'epo, is one of the balisana.

Molise's homestead is in the same village, separated from Thabo's by about two hundred yards of open land. Molise has five cattle, but he sends none of them up to the summer grazing. There are so few that he hopes to be able to look after them well enough locally. His son also, like most of the young boys, is a molisana, but only round the neighbourhood. He takes the cattle out by day and keeps half an eye on them

while he chats and plays with the other young herdboys, but brings them back to the draal at night, and sleeps at home. In other respects, Thabo and Molise are similarly placed. Both of them have the recognised allocation of three lands, which they cultivate and harvest in the summer, and which are open to communal grazing when the grain has been taken off the stalks.

One night, Thabo sent his son Ts'epo out secretly, to drive the cattle on to Molise's lands (about half a mile away) and feed on the growing corn. Molise heard a noise, and thought his cattle had broken out of the kraal, but when he went out to inspect, he found that they were still inside. He heard the noise of cattle munching stalks, and found them eventually grazing on his land. Ts'epo concealed himself and was nowhere to be seen. Molise herded the cattle and drove them off to the headman, who impounded them in the kraal he kept for the purpose; in the morning, they were recognised as belonging to Thabo and Thabo was promptly sent for.

Following the usual procedure in such cases, the headman chose four men, none of them related to either Thabo or Molise, and sent them to inspect and assess the damage to Molise's crops. (Had he not been able to find four such men, he would have gone to the headman of a neighbouring village, or if that failed, he would have gone to his superior chief to get the men that were required). The headman, since he knew that he was to judge the matter, did not go to inspect the damage.

The four men went out, accompanied by both Thabo and Molise, and discussed the matter. Molise overclaimed, putting too high a figure on his loss. The four assessors went off apart, and after some discussion returned to tell Molise that he was asking too much. After some haggling, Thabo and Molise agreed on a figure of twenty Rand, and the headman was so informed. Thabo signed an agreement in these terms, and after he had paid sixpence a head as a pound fee the cattle were released to him. (This money, which is regarded as a "fine", is a perquisite of the keeper of the pound, an appointment in the headman's gift. It is the duty of the keeper to graze the cattle and look after them and to return them to the pound-kraal in the evening.) What Thabo should now have done was to pay over the twenty Rand to the chief, who in his turn would pay it to Molise. But Thabo

tried to cheat. First, he brought two sheep and two goats, putting a value of £2.10.0 (five Rand) on each of them. This was reasonable in itself, but in fact Thabo could produce no bewys (Afrikaans: certificate of ownership - it is illegal for beasts to change hands without a bewys). He was sent off to produce the bewys, and took his beasts with him. He then went to a friend, and the two, in collusion, found the chief alone and agreed falsely that the animals had been handed over. The chief was uncertain where the rights and wrongs lay, and Molise therefore took the case over his head to the lekhotla la puso at Rothe. The banna ba lekhotla (officers of the court) decided to send the case on to the judicial court, Rothe Local. When the case was heard, Thabo did not call the headman as a witness, but the headman, knowing that the case was to be heard, went to the hearing and the President of the Court called him to give evidence, against Thabo's protests. During the course of questioning, the President asked Thabo if the headman was alone at the time that the beasts were handed over. Thabo, knowing that if he replied in the negative the court would want to hear from the others present on the occasion, was compelled to reply that he was alone. The President then declared that this answer proved that Thabo was lying, since such transactions never took place without witnesses and Thabo would not have handed the beasts over in private.

The President in question was new to the area (Court Presidents are in any case not usually subjects of the chief of the area in which the court sits), but in fact the lekhotla la puso at Rothe had passed over both to him and to his clerk the record of their own proceedings, in which Thabo and his friend were named as rogues who had been in trouble for similar deceptions in the past. The President, therefore, was not a stranger to the case, and was so conscious of the trickery that was in process that he threatened one witness with a fine of £12 if he tried to tell lies.

After the case was finished (in Molise's favour), the Court President asked Thabo, out of court, why he had attempted to defend the case when his actions had put him so clearly in the wrong. Thabo replied with a laugh that he knew he had no real case at all, but was simply hoping that through some chance he might nevertheless get away with it. However, the President at Rothe Local, in spite or because of the cleverness

that he showed in tricking Thabo into a damaging lie, is not highly regarded in the district; and this view was shared by the Department of Justice, who regarded him as one of the poorest presidents on their books.

Once a case is before the court, the chief's responsibilities do not end. He should make sure that witnesses attend, and should be told the decision which the court has reached, so that he may be sure that its terms are understood and followed through. Where, as often happens, a disputant is illiterate or insufficiently literate to cope with the formal side of the case, the chief or his court serve a very important function in taking the necessary steps.

But much depends on the individual chief, and on the effectiveness of chieftainship in the area as a whole. Where chiefs are lazy or incompetent, people will seek their justice where they can find it. There is also a growing sense, though this can be only impressionistically assessed, that the judicial courts offer an independent set of tribunals against which even the chief cannot ultimately prevail (23).

CHAPTER FOUR

Chieftainship: Administration and Jurisdiction

The principal function of chieftainship concerns the land. Sheddick's terminology, distinguishing between "administrative" and "usufructuary" titles will be adopted in what follows (Sheddick 1954: 1-12), though under the caution that the concept of "usufruct" as used here is specific to the topic and does not carry the implications it possesses under Roman and Roman-Dutch law (Sheddick 1954: p.4 n.1). The basic principle is that mobu ke oa sechaba, "the land belongs to the nation". This maxim, as it stands, would of course be meaningless were it not given practical implementation and operated. The chieftainship is the institutional means whereby the "national" ownership of the land is given practical effect. The current Roman-Dutch conceptualization is that the land belongs to the nation, and is held "in trust" for it by the Paramount Chief. The Paramount Chief is then thought of as delegating his trust to the subordinate chieftainship, who in turn delegate to their sub-chiefs and headman. This is the view expressed in Lekulana v. Borena J.C. 108/56, by Ramsden as Judicial Commissioner. Sheddick also, though avoiding this kind of terminology, approaches a similar perspective in what is perhaps a rather "over-circumspective" view of the Paramount's position

(1954: 141). As has been argued above, the chieftainship has a more collegial character than such formulations suggest (1). Nevertheless, it is true that the ultimate right over land is in the Paramount, and that lower chiefs and other persons participate in this to varying degrees according to their rank; but the notion of "delegation" is best kept for liphala and baabi, discussed below (2). In the first place, chiefs cannot be simply removed from their place by decree. In a very formal sense, of course, they can be, by the political act of the Resident Commissioner (now Parliament), but such an act would be regarded as wrongful and illegitimate. If a chief is removed, this is for cause shown and after careful consideration by the Paramount Chief or the College of Chiefs (in the 1959 Constitution) (3). But this is personal to the chief and does not interrupt the succession. It is also true that chiefs could lose some of their rights as a result of a "placing", but this was a fully institutionalised process that did not formally take away the incumbent's chieftainship. (The new constitution treats chieftainship as a vested right, justiciable by the courts, and only defeasible by a political act with the authority of Parliament. This reversion to the system preceding the College of Chiefs structure is not unfaithful to traditional practice (4).) The second reason why "delegation" is an inappropriate concept to describe the relationship between higher

and lower chiefs is that a superior chief is bound to "work through" his subordinate and cannot, properly, act directly in that subordinate's ward. Since a chief does not, by his presence, annul his subordinate's position, the latter is not a delegate of his superior. It is true that a chief or headman should not act directly over the head of a phala either, but since a phala can be dismissed without formality, this makes little practical difference. These topics are discussed in detail below.

The administrative rights vested in the chieftainship extend over the whole area of Basutoland, with the exception of those areas that are specifically withdrawn from their control -- in effect, the nine government "camps" or "reserves", and other government sites such as police stations and barracks, some hospitals, and outlying administrative offices. To all intents and purposes, the whole of the land area falls under chiefly administration and control, and wherever such derivative rights to the use and produce of land as can be and are allocated to subjects fail through death, removal or forfeiture, they revert to the chieftainship for reallocation. Most of the ensuing discussion will be concerned with rights to arable land, which is the central case, but it must be stressed that even where different kinds of land use are involved, the "radical right" remains in the chieftainship. Thus, homestead-sites, some tree

plantations and gardens are not "arable" lands in the relevant sense (not even if a garden site is ploughed) and it is both possible and normal for such sites to be inherited; but such inheritance is subject to certain conditions, and in no way removes the site from chiefly administration and control. If the inheritance fails, the site returns to the chief, who can then re-allocate it. Land which has so fallen back does not, however, "belong" to the chief; that is to say, it is not the case that the chief is a simple "owner" of the land of his ward (even if this were read subject to the position of his superiors). It is still the case that mobu ke oa sechaba, and although a chief can indeed allocate land to himself, it is only such land that even in a limited sense can be said to "belong" to him. In other words, administrative and usufructuary titles are held distinct, even where no present usufructuary exists. Nor does unallocated land form part of the masimo a lira, which are in a different category again. The phrase means, literally, "lands of the enemy", and is usually translated by "chieftainship fields". These are lands that are specifically annexed to the chieftainship as such, and their identity remains constant. Strictly speaking, only Principal Chiefs have the right to masimo a lira, though they exist in important subordinate chiefdoms too (v. Sheddick 1954: 147 ff.; see also Sekake v. Tautona J.C. 15/59, Appendix II below, where evidence shows that lira lands are

attached to the ward of Patlong). These were the primary focus for matsema labour (working parties summoned by the chief) and are supposed to provide the wherewithal for the discharge of the obligations of chieftainship referred to above (5).

The "national" character of the soil and its wealth is perhaps most clearly seen in the case of grazing land (leboella, pl. maboella, in the narrower sense (6); it can also be used to include other land, such as reed beds and "public" tree-areas, which while not used for grazing is not allocated to individual homesteads). The general topic has been well canvassed by Sheddick (1954: 104 ff., 116 ff., 153 ff.), Duncan (1960: 74 ff.) and Wallman (1969: 103 ff.), and what is there said will not be reiterated except so far as relevant. The mountain grazing-grounds, where cattle are driven for summer pasturage, are in general withdrawn from arable use, though encroachment is common if unlawful. Administration tends to lie directly in the hands of major chiefs, who however will appoint local caretakers to supervise the maboella on the spot when they are in use. Grazing is permitted only at specified times of the year, and is in principle open to all the subjects of the Principal Chief who either holds maboella areas within his own ward or who has obtained permission from a chief with such rights to allow his subjects to use the area for grazing their

cattle. Maboella thus cut across the ordinary system of chiefly administration, in that they operate on a Principal Ward basis, and the headmen who have charge of a leboella are not in the same position as other subordinate chiefs, except in regard to those people -- if indeed there are any -- who live permanently under them. Maboella thus constitute a second and parallel resource, additional to that represented by arable land, and a very precious one indeed (cf. Wallman 1969: 115) (7). They are a national resource which differs from arable lands not only in the obvious respects but also in that rights to lands are individuated and specified -- a landholder has the use of this and that identified field -- whereas rights to grazing are essentially diffuse: all of a given category of person can use any of a large area of grazing land, from the time announced for the "opening of the leboella" until the onset of winter and the long trek home. The chief who "has the right", when he opens the leboella, is administering a national asset, and not manipulating a personal prerogative or choosing between one man and another, as in the case of allocating arable land. When the Chief of 'Mamathe's showed favouritism in allowing some subjects to use the leboella and not others, the court at 'Mamathe's (unsurprisingly) upheld his right to do as he pleased. But the Paramount Chief's Court reversed the decision, stating

that maboella ke a sechaba, "Maboella belong to the nation" (Masopha v. Mabu J.C. 261/48). On appeal to the Judicial Commissioner, the Chief was successful, the Court taking the inevitable "modern law" view that the chief's favouritism was deplorable but that it was an administrative matter within his discretion, though he had certainly acted abusively. The difficulty that confronted the court was that of what specific order it could, judicially, make: for the Paramount Chief's Court this was naturally no problem at all, provided the chief had acted against the "national" principle at stake. But in Matlosa v. Ramokone J.C. 130/54, the court at Matsieng refused to listen to a subject who complained that he had been forbidden the leboella while some others had been admitted: "Chief Mojela knows the reasons why he has allowed those people to graze their stock". There are, indeed, certain reasons why people with infirm stock should be given a prior right to use the grazing, and the Matsieng judgment follows this rule.

The diffusely "national" character of the cattle-post maboella (8) accounts for the special position of the Paramount Chief in relation to them, to which attention has already been drawn (see Chapter Two note 35 above). The maboella that exist outside the cattle-post country, and are to be found in most wards of every level of jurisdiction, are however subject to the same general principles, though they fall under

the immediate authority of the local chief, who designates where and at what times the cattle may be grazed. He does not, however, designate by whom they may be grazed, since this is defined in terms of the ward involved, and all entitled cattle-owners may use the leboella once they have been opened (9).

However, though maboella (and especially those at the cattle-posts) may represent the most general and diffuse sense of the doctrine that all land resources belong to the nation, the most central concern, both for this discussion and for Basutoland, is that of arable land, the chiefs' administrative role in relation to it, and the character and operation of their subjects' rights and duties.

As was noted in Chapter Two, while jurisdictions in Basutoland are in principle territorially defined, such that each chief has a discrete and unitary ward, there are many exceptions (Chapter Two, note 35). Those that are relevant to the administration of arable land are, in particular, the institutions of paballo and mekopu e namelane. Paballo (10), which Sheddick defines as "the loan of administrative rights in land" (1954: 139; and see following pages), has been a source of continual disputes, and is now illegal. The Paramount Chief's rule, referred to as the "elimination of lipaballo", issued in 1958, contains a definition and description of the practice that serves as a starting-point for the discussion.

Elimination of Lipaballo

A. In this rule (molao) unless inconsistent with the context, paballo means

(1) An area (sebaka) in the caretaking (boliseng) of one chief the rights to which are vested in another chief, and the inhabitants of which and any headman who may be placed over them, whether recognised... or not, owe allegiance to such other chief ("area paballo"); and

(2) land in the caretaking of one chief or headman used by a person or persons subordinate to a different chief or headman

(a) where rights are granted to such person or persons, by the chief or headman in whose area the paballo falls, to have the use of the land in his area while continuing to live in the caretaking of their own chief or headman; or

(b) where such person or persons live as well as use land in the caretaking of the chief or headman granting the paballo, while continuing to owe allegiance to their own chief or headman; or

(c) where such person or persons live but have the use of no land besides a dwelling site (land paballo); and

(3) the Basuto custom (moetlo oa Basotho) whereby land rights in the caretaking of one chief or headman may be granted to a different chief or headman or to a person or persons subordinate to another chief or headman (custom of paballo).

B. Subject to the provisions of paragraph (3), after the commencement of this rule no rights or alleged rights which accrued... to any chief headman individual or community by virtue of the Basuto custom of paballo shall be cognizable by any Court of Law in this Territory.

C. (1) Subjects of a chief to whom an area paballo has been granted who live or plough on such paballo shall have the right to decide whether they shall continue to owe allegiance to their original chief and leave the paballo area or continue to live on the paballo and transfer their allegiance to the chief in whose caretaking the paballo falls:

Provided that the chief in whose caretaking the paballo falls may refuse to accept as his subjects persons of known bad character or who are known to be hostile to himself, and in such case such persons shall move to the caretaking of their original chief:

Provided further that any such person who has not been accepted by the chief may appeal to the Paramount Chief on the grounds that the refusal to accept him was unreasonable, and the decision of the Paramount Chief shall be final.

(2) Where an area paballo is under the supervision of a headman... such headman shall become the subordinate of the chief in whose caretaking the paballo falls:

Provided that if he so desires the individual headman may abdicate his rights to the headmanship and move to the caretaking of his original chief.

D. After the commencement of this rule (molao) the grant of any new paballo shall be unlawful (e tla ba ka thoko ho molao)....

(Laws of Lerotholi (1959) Part II s.40)

Embedded in these definitions, there is a distinction between paballo ea mpa ("for the stomach") and paballo e hlapenyelitsoeng ("sworn paballo", also known as "paballo for the children"). The first of these is relatively straightforward, and is not so much the loan of an administrative title as the short-term provision of usufructuary rights by one chief to another for the use of the latter's subjects. Grazing rights (in particular the rights of stover after the lands have been harvested) remain with the donor chief, to whom also the lands revert on the death or removal of the landholder (Mafeka v. Libetoe J.C. 74/56).

The contentious form of paballo is the second, which involves the indefinite and long-term transfer of administrative rights over an area from a donor chief to a recipient chief. What he retains is, in such a case, simply the radical right of ultimate

reversion, together with some sort of expectation that he will be treated as the "real" chief of the area concerned. Lipaballo of this kind are frequently made at the behest of a superior chief, who requires either that of two subordinate chiefs one should make a paballo-grant to the other or that an inferior chief or headman should grant a paballo to his superior (11). It can be used as a way of in effect expropriating one chief for the benefit of another whom the superior desires to favour, while leaving the donor's position sufficiently intact at a formal level for him to be in a weak position to complain that his rights have been confiscated. When eventually the paballo is recalled, moreover, problems are created for those subjects of the recipient chief who have settled in the paballo area, and there is every inducement for them to resist any change. It was, indeed, the frequency and bitterness of disputes over lipaballo, that occasioned their "elimination" in 1958: but, predictably, this new law has been the occasion for still further dispute, since many lipaballo are generations old and questions of fact arise concerning whether an area was in fact a paballo or not, and if so where the boundaries fall. Lipaballo may have been eliminated, but quarrels over them certainly have not, as the cases discussed below reveal (12).

Paballo must be distinguished from the situation described in the phrase mekopu e namelane, "let the

pumpkins intertwine". Where no boundary exists between two chiefs, or between a chief and a subordinate, the lands are frequently scattered about, at least in the intermediate area, with one land being under the jurisdiction of one caretaker and the next land under that of another. As the Paramount Chief's Court put it in the judgment in Seeisa v. Nts'oereng J.C. 31/45, "mekopu e namelane, bana ba lesafo ba ja pitsaneng e le 'ngoe" -- "let the pumpkins grow together, children of the same stock (13) eat from one bowl". In the area of Masite, people from Masite Nek, from Ramakau's village, and from Masite, all three, have their fields mixed up. When headman Chitja was proclaimed at Masite Nek, and Ramakau was placed over him as titular chief of Masite, no boundaries were drawn, and as people moved from one village to another within the same chiefdom when they set up a home on marriage they often retained their fields, though strictly speaking they were now in another formal area, in that they had moved out of or into Chitja's headmanship. If, for the convenience of living near their lands, they wished to arrange an exchange, they were free to ask the chief to try to procure this or to ratify a private arrangement, but otherwise they continued with the lands they had before. Since lands are scattered about, and people tend not to have all their holdings together, it was likely that a change of residence would bring the landholder

nearer to one of his lands than he had been before, and no further from the others. Such an arrangement works well and no issue comes up for decision until a quarrel breaks out, in which case there is much dispute about distant events and previous rights. Grazing, thatching-grass beds and other maboella are, however, separately disposed between Chitja and Ramakau, and this is a source of dispute between the two. The Basotho courts have usually tried to persuade litigants to go back and try to live together (e.g., the Paramount Chief's Court in Seeisa above), but if this proves impossible, the superior chief must define a boundary, and of course this is an occasion for further quarrelling.

Both paballo and interploughing (as mekopu etc. is called (14)) raise the question of the nature of the relationship between chiefs of different degree and between chiefs and headmen. This issue is complex and contentious enough in "traditional" terms and has been further complicated by the competing interpretations placed on the ambiguous and even obscure wording of some modern enactments. As has been seen, a caretaker must always act "through" (ka) or "with" (le) his subordinate, but this requirement has all the uncertainty that characterises many areas of Sotho law, and leaves room for dispute whether it is satisfied if the superior instead of acting directly acts by giving an order to his subordinate, or if the

injunction leaves the subordinate free to disobey if he dislikes what his superior has proposed to him. Two points to note in particular are that the position of a chief differs from that of a headman, and that appeal procedure is a different matter again. It is probably the case that (at least traditionally) a chief had more or less full autonomy within his ward, but that a headman did not, and that while acting "through" or "with" a subordinate chief meant co-operating with him, if the subordinate were a headman it meant that he had to carry out his superior's wishes, though the latter could not act directly (15). Some recent interpretations of the position, however, have come near to equating the positions of the two categories, in the headman's favour, so that there is no particular content in the distinction save in terms of honorific style. It is also important to note that appeals against the administrative acts of a headman or a subordinate chief can be taken to the lekhotla la puso of the superior chief (often the Principal Chief) (16). But this appeal procedure is a separate matter from the question of the "original" jurisdiction of subordinates.

The general discussion of these related topics -- paballo, mekopu, and the relative rights of chiefs -- can now be interrupted, and the problems that they pose considered in the light of some disputes. Most of the cases to be described involve more than one of the

issues, and show how they have a bearing on each other, creating at every turn a new set of choices for both litigants and judge. Some of the events recorded raise points of law and practice that are relevant to other matters of concern, and these will also be the subject of some discussion.

The case of Mafetoa v. Mothebesoane J.C. 256/48 raises questions of paballo, but has wider implications as well. Mafetoa was a chief in 'Mamathe's ward, who had a younger brother, Mothebesoane, living in another ward and not his subject. He gave Mothebesoane some land for his support and that of his children. Both brothers died, and were succeeded by their sons, Masupha and Mpiti respectively. Masupha then took back the land -- or area (17) -- and Mpiti went to law to regain it. The transaction could be regarded in several ways: as an allocation of land (kabo ea masimo), as a paballo of an area, or as a kind of placing. The Paramount Chief's Court did not definitively resolve these issues. It awarded the land to Mpiti, on several not fully compatible grounds. Mpiti had been ploughing the lands for six years; they had been "given" to his father for the children's support; Mpiti had taken his father's place; and, finally, "it is difficult for us to undo what your fathers had agreed on together". The land was treated, in fact, as a "gift" (mpho), though this is not (as will be seen) a concept that can be directly

associated with allocation: yet the judgment equally holds back from considering the matter to involve either the paballo or the outright grant of jurisdiction. The case is particularly interesting because of the light it shows on the principles controlling Basotho judicial decision-making ("it is difficult for us to undo what your fathers agreed on") and for the significant gloss it places on the doctrine of ts'imo hase lefa ("land is not an inheritance"). The case will be referred to again when this doctrine is discussed in detail below, Chapter Five.

The case of Lirahalibonoe Letsie v. Lesaoana Sempe J.C. 201/55 is a relatively straightforward boundary dispute, involving questions of alleged paballo; the dispute arose before the law eliminating lipaballo. Lirahalibonoe is chief of Likupa's, in the ward of Likhoele (at the time, not an independent Principal Chiefdom). Lesaoana Sempe, whose name has occurred before in this narrative, is chief of Liphiring, and was accused by the plaintiff of exercising rights of jurisdiction within the latter's area, in particular by issuing lands and marking leboella there. Lirahalibonoe claimed that the disputed area had been given to his grandfather by Lerotholi, the Paramount Chief who reigned from 1891 to 1905, and that some of Lerotholi's people still lived there. Afterwards, a dispute broke out between the then chiefs of Liphiring and Likupa, which was resolved when Paramount Chief

Griffith fixed a boundary in 1930, by his messengers. (As has been remarked, a chief's "messengers" are not small men; one of them in this case was Chief Lerotholi Mojela of Tebang. It should also be observed at this point that the dispute and its origins go back before the memories and even the lives of most of the actors.) The lower court at Likhoele, however, decided that the area in dispute was a paballo, a situation compatible both with the allocation claimed by Lira and with Lesaoana's claim to have rights over it. However, this was enough to resolve the matter, since not only did Lira contest the paballo, but there was also no clear boundary at certain points: Griffith having decided, as not seldom occurred, that the best way of stopping disputes in an area was to close it off altogether in the hope that with time matters would settle themselves. The next court, again at Likhoele, found an escape from its difficulties by sending the disputants before the Chief of Likhoele to make an administrative decision. A familiar feature of area disputes is their despatch from judicial to administrative courts and back again. The Chief over both of two quarrelling chiefs, if he is reluctant to decide between them, hopes that by sending them to the judicial courts he will escape the need to act: it is, after all, a question of who has the vested right, and this is not a matter for the administration. But the judicial

court, faced with the problem not of vested rights but of the concrete res to which the right adheres, decides that it is not for the (judicial) courts to draw boundaries and sends the dispute back to the chief (18).

The Paramount Chief's Court (in fact, A.C.I Matsieng) upheld the existence of a paballo, and sent the chiefs home again, telling them that if their subjects had any complaints about lands being wrongly issued, or issued to the wrong people, they should bring up the case themselves, and that the chiefs should not dispute on their behalf. (In Moeno's case, below, it will conversely be seen how, when subjects litigate, they can be doing so as catspaws for quarrelling chiefs.) If the chiefs wanted the doubts surrounding the boundary cleared up, they should go to their common Chief.

One particular mark of difference between a chief and a headman occurs in the "Elimination of Lipaballo" law quoted above, and entered into Mpo v. Mopeli J.C. 107/60; this difference, which reflects traditional distinctions, arises in section C of Laws of Lerotholi (1959) II 40, where it is clear that it is for chiefs, and not for headmen (who are specifically named in A and B - "ramotse"), to terminate lipaballo. Headmen must either continue with the chief in whose area the paballo falls (i.e., the "donor" chief), or to resign their position, move out of the paballo area, and go with the "recipient" chief: in other words, their obligations are analogous to those of their subjects,

who must make a final choice between their lands and their chief. It is chiefly caretakings, not those of headmen, that determine how the new boundaries are drawn, and headmen have no active role attributed to them in the matter (19).

Chief Buller Peete, Chief of Motloang in Makhabane's ward of Koeneng and Mapoteng, was engaged in almost continuous litigation over area rights in the 'fifties and 'sixties (20). The first case to be considered is the action that he raised against his younger brother (cousin) Lihoapa Lejaha, his subordinate headman at Mokhathi's (Lejaha v. Peete J.C. 26/64, cf. Mapoteng Local C.C. 188/62, Motjoka Central C.C. 8/63). The case took its root in a judgment of the Paramount Chief's Court in 1940, when Lihoapa was accused of allocating lands within Buller's area. The court ordered that Buller had the right to allocate virgin and fallow lands "through your younger brother Lihoapa by mutual arrangement". In a sarcastic address, Buller asked "whether now that there are new courts the judgment of the Basotho courts have become invalid, so that I may know and not trouble Chief Lihoapa any further.... I should like to be enlightened as to whether decisions of the past no longer have any force". Lihoapa took Buller up on the point, freely admitting the "charge" against him (that he had allocated lands without consultation) and taking his stand on Laws of

Lerotholi (1959) s.7, where it is stated that every (gazetted) chief and headman is responsible within his area for the allocation of lands to his subjects.

"I no longer think in terms of the judgment of the Paramount Chief, I have set it aside. In accordance with the Laws of Lerotholi I plead not guilty". The lower court upheld Lihoapa, and Buller thereupon appealed, arguing that the mere fact of gazettelement did not make Lihoapa more than what he was -- Buller's headman, who had precisely the rights awarded to him by the Paramount Chief in 1940 and no more. The Central Court accepted Buller's argument, distinguishing between a chief, who is assumed to have complete internal jurisdiction, and a headman, who has what he is given. "I do not believe that being gazetted gave power to the recipient that he did not previously have". This clearly reflects the customary law of the matter, but the Judicial Commissioner, interpreting Laws of Lerotholi with the precision of a lawyer, reinstated Lihoapa -- and thus rendered nugatory the distinction between chiefs and headmen, reading the Declaration of Custom as though it were simply a question of terminology or at most of prestige.

In 1964, Chief Buller was again engaged in litigation against Lihoapa, who was on this occasion represented by his son Leluma (Lejaha v. Peete J.C. 135/65 etc.). He told the court at Mapoteng that he had received a letter from Lehoapa which instructed him (Buller) and

his "people who plough here" to cease using the lands which were in Lihoapa's area and which, following the law eliminating Lipaballo, were now returned to his full jurisdiction. "I say to the court," said Buller, "Lihoapa is my headman, I am a chief. Shall I bring it to the Court's mind, who is senior between a headman and a chief? If I am a chief, how can my headman be superior to me?" After his disappointment in February, the question was probably more anxious than rhetorical. Lihoapa, in reply, began by recalling his victory in the previous case, and went on to base himself on the elimination of lipaballo, and specifically on section (40 (2) (b)) (see above). Adding the confirmation of his status obtained from the Judicial Commissioner on the basis of the latter's reading of Laws of Lerotholi s.7, Lihoapa argued that as a proclaimed headman he was not only within his rights, he was in fact obliged, to expel Buller from his caretaking. He was ready to admit that the powers of a chief and of a headman differed, but when pressed replied that "the Chief's powers are greater in administration (puso)", namely, in appeals arising from lower levels of hierarchy. The lower court supported Buller, asking "can the headman baballa his chief?" The issue was beginning to turn, not on whether or not Lihoapa was caretaker of the area where the lands were, but on Buller's right to use lawfully allocated lands within his own ward,

even though they were also within Lihoapa's caretaking. Lihoapa appealed, stating his reasons somewhat petulantly and implying that the court was consciously twisting the law against him. The Central Court at Motjoka under J.M. Mohale dismissed the appeal; it pointed out that when a chief is placed, he is taken to more than one headman, and these headmen are required to give the new chief a bokhina-pere -- lands for the chief and the people who come with him (see the matter of Seeiso's placing in Mokhotlong in Chapter Two, and Lelingoana's case J.C. 31/46). The Court pointed out that if such lands were to count as paballo, such a chief would have no lands at all, only the bare jurisdiction with nothing else to support him as a man, let alone as a chief. It followed that a chief cannot be the recipient of a paballo in respect of lands which he holds, as chief, in subordinate wards. (Perhaps this was to overstate the matter, since a chief might additionally take lands in paballo, though the point was not essential to the case.) Pointing out that the law eliminating lipaballo referred (s.2) to "land in the caretaking of one chief or headman used by a person... subordinate to another chief or headman", the Court reasoned that Buller was not subordinate to such another within his own ward. "The area where the lands are situated belongs to Buller under the caretaking of his headman Lihoapa...." On this occasion, the Judicial Commissioner upheld the lower

courts, adding only the point that while the new law required landholders to choose to follow either their chief or their land, this could not apply to a chief in circumstances where it would mean that he became the subordinate of his own headman.

The dispute between Buller and Lihoapa continued, and in the case of Letima v. Peete J.C. 54/66 it took the form of an action not directly between the chiefs themselves but between two of their subjects (see Lirahalibonoe's case above, and Moeno below; most jurisdictional disputes reach the courts when two landholders sue each other -- often the issue turns on which chief had the right to allocate). Peete, the plaintiff at Mapoteng, complained that he had been allotted a land by Buller in 1944, and that Lihoapa, purporting to act in terms of the law eliminating lipaballo, had taken it from him and given it to Letima. Letima's reply was that this was the lawful, indeed mandatory, procedure. The Mapoteng Court upheld Lihoapa's right, stating that a paballo between Buller and his headman was struck at by the law, and that subjects must choose either to follow their chief and lose their lands or keep their lands and change their chief. There were also clear party-political overtones to this case. The Mapoteng hearing took place in March 1965, just five weeks before the first General Election, and party-political activity was reaching a climax of

intensity, rivalry between the National Party and Congress being cross-cut by the activities of the divided but still hopeful Marematlou-Freedom Party. Buller and Lihoapa, like Peete and Letima, were divided across these lines, and there was a strong suggestion that the Court President sided with Letima on political grounds. The appeal was heard at Motjoka in June, when the court followed its own logic in the previous case (Lejaha v. Peete, discussed above); Mohale was again president. He declared that "Lihoapa is headman under Chief Buller, who is not a 'different chief'.... This field does not fall under the law relating to lipaballo". If it was a loan at all, it was a case of interploughing, but Peete could not be evicted so long as he remained on the land. Letima now appealed, and the Judicial Commissioner held that Lihoapa was entitled to act as he did; in other words, he decided that the ruling he had given in the previous case protected the chief alone, and not his subjects. The view of the Central Court was not very dissimilar, in as much as although it maintained that the land was not a paballo (since Buller was the chief of the whole area) and protected Peete's tenure, it suggested that on Peete's death or removal the land would fall back to Lihoapa for re-allocation. The position, however, was obscured by the uncertainty as to whether the land in question was in the same category as the Chief's

fields referred to in the previous judgment, and also by the nature of the boundary, which was a temporary one that cut across the disputed land.

The case of Moeno J.C. 214/64 occurred at Masite Nek, and concerns the relationships between chiefs and headmen. The Moeno family are among the older inhabitants of the village, and are mentioned at various points in the current study (for their official links with the ruling house of Mohlalefi see Chapter Two note 36). It will be remembered that Ramakau is the chief of the Masite, subordinate to Mohlalefi Bereng at Rothe, and that Chitja Mohloae is the headman under Ramakan at Masite Nek. The headmanship had belonged to the Moeno lineage, but they lost it when Chitja was placed. Old Philemon, the senior Moeno alive, acts as phala and as head of the Moeno's is left to supervise the affairs of the cluster of households and homestead in the Moeno corner of the village. Philemon's younger brother (third son of their father Pokane) predeceased his wife, who was left to bring up the children; she had no assistance from Philemon, who disliked her. She also died, and her son Douglas cut his ties with the family, moved out of the Moeno hamlet and built his own house separately, though at a close distance.

Douglas was allocated a site in Masite Nek by Ramakau; Chitja, on the other hand, allocated the same site to Monnamoholo, son of Philemon and a senior

in the family. The case thus involved, first, a dispute between two Moeno sub-lineages, or perhaps rather two factions with the lineage, and second, a trial of strength between Chitja and Ramakau. Chitja refused to accept Ramakau's allocation -- he admitted that he was the chief's hand (letsoho), but claimed that he, Chitja, had the right to allocate; "I could not eat inedible bread". This points up the ambiguity in a junior caretaker's rights -- does he have the right to allocate in the sense that he can decide the allocation? or only in the sense that he is the man who carries it out? The dispute went to the administrative court at Rothe, the consequence being that the acting chief wrote a formal letter to Ramakau, in the course of which he said: "You should see to it that your headman satisfies your orders in allocating the site to (Douglas).... Send out messengers after speaking to your headman, to see that your orders are obeyed". The judicial court at Rothe accepted that Chitja had been present when Douglas was given the site by Ramakau's messengers, and that the authority of Chief Mohlalefi (the Principal Chief) was behind the allocation, in terms of the decision of the administrative court. It accused Chitja of using his subject as a stalking-horse for challenging Ramakau. On appeal by Monnamoholo, the Central Court at Matsieng started off, accurately enough, by observing that the case was

"riddled with lies", but concentrated on the fact that Ramakau, after his success before the "puso" at Rothe, had sent his messengers to act directly within Chitja's village. This was a contravention of the law and custom of the country. What Ramakau should have done was to order Chitja to allocate to Douglas, using the authority of the superior chief to enforce his will, but not to act directly in Masite Nek. Because of this illegality, Chitja's allocation to Monnamoholo was confirmed (21).

CHAPTER FIVE

Chiefs, People and the Land

The topic to be considered in this chapter is the usufructuary aspect of chiefly control of land resources: the procedures and norms in terms of which lands (fields) are made available to the population. From the point of view of the socio-economic life of the people, this is the crucial issue. In common with other Southern Bantu kingdoms, Basutoland's life centres on the land. In principle, every adult (1) Mosotho has a right to an allocation of land to provide for his subsistence and that of his family and dependents, and it is for the chiefs to arrange for him to have this (2). In return, the subject owes allegiance to the chief, residence within the ward belonging to the chief (3), and cultivation of the lands allocated to him. If he withdraws his allegiance he loses his lands and can be expelled from the area completely (4). Traditionally, as has been seen, this took the form of "turning the door of the hut" (ho reteletsa ntlo monyako) against his own chief, which formerly implied looking to another chief instead (5). Now that it is more possible to "escape" from chieftainship altogether, by seeking employment or other productive activity whether in Basutoland or in the Republic of South Africa, it does not necessarily follow that to abandon one chief is to turn to another;

but in the past this was the case, since the only source of rights to residence and the only access to the economic conditions for survival lay with the chieftainship. But it is still true today that the tenure of lands represents an ultimate security, a residual fall-back, even for those who do not presently stand in need of it; the greater part of the population, however, do stand in immediate and direct need of land and the consequence is that the general claim on land resources remains vigorous and that the role of the chiefs, as mediators of this diffuse right, remains central (6). The general and diffuse "right of avail" is without content until it is specified by a particular allocation: it is not a specific right to this field, nor (in the case of a "stranger") does it impose even a general duty on this chief. Even one born into a particular ward has still only a diffuse claim on his own chief, and it is the latter's task so to administer the land in his area that, so far as possible, all claimants receive a share in the available resources.

The allocation of land resources is particularly crucial in view of the pressures upon land (7). This situation puts considerable power in the hands of chiefs and renders matters of land administration both contentious and delicate. In theory, every adult married Mosotho male has a basic entitlement to three lands. The question of size is at least marginally

relevant, in that a man with very small fields (masimo, sing. ts'imo) is more likely to succeed in an application for a further allocation than a similarly placed man with large ones (Morojele 1962: Part 3, p.44); but as Sandra Wallman's brilliant and incisive article on Sesotho measurement shows (Wallman: 1965), there is little or no concern with exact calculation, fields being measured in terms of their width alone, the length being left out of account (8). What is always stressed is the number of fields, and it is only in response to specific questioning, or where a field is particularly large (like Mohlalefi's field at Thaba-Chitja referred to above: but this is more a consolidated arable bloc consisting of many fields) that size is animadverted to. The norm of three lands (fields) is steadfastly adhered to, though in the face of the evidence this represents, again, more a moral than an actuarial expectation. It means that a man with fewer than three lands considers that he has a good case for seeking more, and that a man with four or more must show special grounds for asking for any others or even for keeping all those that he has. A man with three is (other things being equal) in the proper condition of a Mosotho and can expect to be left with them. But though in the past the expectation of three fields corresponded to the statistical norm (which is no doubt how the figure became established) this is no longer

the case. The 1960 Agricultural Census shows that more holdings have two fields than have three, except in the Border Lowlands, where the two categories are about equal. The average number of fields per holding (of all holdings with fields) has been estimated at 2.4 (9). The consequence is that well over half (59 per cent) of all holdings have fewer than the acknowledged norm, so that even taking into account the fact that some persons (widows, residual families with adult children away and no dependants) may not be entitled to the full complement, there remains a substantial number of people who experience a felt land-hunger that is also normatively legitimised. Land is therefore an issue of crucial importance and there is no dearth of claims and counterclaims in respect of its allocation (10).

Some conscious attention is given to the quality and siting of lands. The fragmentation of holdings is due partly to the consideration that it is only fair that a people should share equally the different qualities of land available in a ward; it also is due to the need to distribute the inconveniences of distance fairly, and of course to historical accidents, such as the contingency of a land becoming available in one place and being allocated to an applicant who has another land some distance away. But though people are conscious of the differential yields of different lands, they think of these differences as given facts which

they can do little to modify; quality enters into land matters as a secondary issue, subordinated to the more fundamental question of having a land at all.

It is once more convenient to use the Laws of Lerotholi (1959), Part I, as a starting-point for the discussion of land administration. The relevant section (sec.7) reads as follows:

7. (1) Allocation of land generally (Kabo ea mobu)

Every (gazetted) Chief and every (gazetted) Headman... is responsible, within his area of jurisdiction, for the allocation of land to his subjects (ho beha batho ba hae masimo). It shall be the duty of the Chief and Headman to see that land is allocated fairly and impartially....

(2) Inspection of land (hlahlobo ea mobu)...

Every Chief and every Headman... shall frequently inspect all lands allocated by him in his area for the cultivation of crops and is empowered to take away land from people who in his opinion have more lands than are necessary for their and their families' subsistence (hore ba phele le ho phelisa malapa a bona) and grant such land so taken away to his subjects who have no land or insufficient lands.

(3) Deprivation (kamoho) of land not used or ill used

It will be at the discretion of such Chief or Headman to take away a land or lands which he has allocated to any of his subjects who, through continued absence or insufficient reason, fails for two consecutive years properly (ka nepo) to cultivate or cause to be cultivated.

(4) Retention of lands by widows

No widow shall be deprived of her land except under the provisions of paragraphs (2) and (3).

(5) Provision of lands for minors and other sons on the death of their parents

(a) On the death of the father or mother, whoever dies last, all arable land allocated to them shall be regarded as land that has become

vacant and shall revert to the Chief or Headman for re-allocation.

Should, however there be minor dependants left in such households, it shall be the duty of the guardian... to report (their) presence to the Chief or Headman, and it shall be the duty of the Chief or Headman to make provision for (them), during the period of their minority, from the land or lands of their deceased parents. If the minor dependants are sons, the Chief or Headman shall, on such sons attaining majority, confirm them on the land or lands used for their benefit during the period of their minority.

(b) In the re-allocation of lands which have reverted to the Chief or Headman on the death of the previous occupier and after the needs of any minor dependants have been satisfied... (he) shall give priority... to the requirements of any adult son or sons of the deceased provided (he or they) reside in the village of the deceased.

(c) Any person aggrieved by the action of the Chief or Headman in failing to observe the provisions laid down in this paragraph (5) may appeal to the Paramount Chief.

(AUTHOR'S NOTE: The English edition of (5) (c) reads that "any person aggrieved... may complain to the Principal or Ward Chief... and if dissatisfied... he may appeal to the Paramount Chief". The omission of these words from the Sesotho version points to nothing except an accident, probably the result of haplography.)

(6) Right to select which land to surrender

When under paragraph (2) or (4) above a Chief or Headman orders that a land or lands be surrendered, the person so ordered... shall have the right to choose which land or lands shall be surrendered....

... (8) Land required in the public interest

Except in the public interest (ho etsetsoa sechaba molemo) it shall not be lawful for any person to be deprived of his lands... except in accordance with the provisions of this law.

This statement does not in every particular reflect customary law, but it represents a good approximation to the norms that control lawful land administration.

These can be re-ordered and re-stated as follows:

1) A landholder must receive his land from his chief, or his chief and headman, if any is available. It is, generally, a matter for the local chief to make the decision himself, but a subject can complain to a higher chief if he has been unjustly dealt with. However, the superior is unlikely to do other than leave the matter in the local chief's hands, unless the applicant has the superior's support: in which case, however, the superior would probably have made a "request" in advance, if he could not or would not allocate lands to him from his own direct area.

2) Once he has been allocated land, he has a usufructuary title to it for life, subject to certain conditions. (a) He may lose his land if he removes from the area (ward, including headman's caretaking) where the land is situated. However, removal (though, as will be seen, this includes death) does not include the case where the landholder himself leaves to work elsewhere, for instance in the Republic or in Maseru, provided that he leaves a member or members of his family (for example his wife) to look after the land during his absence. Many people, especially those in urban employment and living with their wives elsewhere, leave brothers or cousins to maintain title, and chiefs do not necessarily regard such people as "removers". The test is rather the two-fold one that (i) the holder

should continue in his allegiance to the chief, tax-payment being the generally recognised index of this and (ii) continue to occupy the land, through others if not by himself. This condition virtually extends the conception of reteletsa (turning the door).

(b) He must cultivate the land or cause it to be cultivated. Land is too scarce to waste, and if it lies untended for two successive years, it can be taken away after inspection and allocated to another, even if the holder continues to reside. (c) If the holder has more than he needs, the Chief may take the surplus away and re-allocate it. It should be emphasised, however, that the usufructuary title is not simply conditional. In principle, the holder has a secure lifelong title, and it is only if certain events occur that he loses it. The conditions, in other words, are strictly resolutive. Again, an aggrieved landholder can complain to the superior chief.

3) Death counts as removal, except that the widow (s) and other minor dependants of the deceased have a right to continue to use the lands, though not necessarily all of them. A widow's entitlement is to two lands. Minor sons should be confirmed on the lands when they attain their majority, provided they remain under the same chief and fulfil the other conditions. Major sons have a special claim to the family lands, though this is weaker than the claim of minors, and again this

is subject to the conditions of tenure.

Underlying these norms, lies the principle which, though easily over-interpreted and open to misunderstanding, nevertheless essentially contains one major component of the law: ts'imo hase lefa, "land is not an inheritance". The subtler implications of this are discussed below, but the broad meaning is that after a "removal" or a forfeiture, the land reverts to the chieftainship for re-allocation, and cannot, when it has so reverted, be claimed as of right as an inheritance by any person who may nevertheless be an heir (mojalefa) for other purposes.

Land allocation by Chiefs and Headmen

The "administrative" or jurisdictional aspect of rights to allocate has been considered in Chapter Four. The concern here is with allocation as it affects the beneficiary or usufructuary. First, it is clear that a chief may appoint a phala to act for him in matters of land allocation, though the Roman-Dutch courts disapprove of "delegating discretion" (e.g. Motsomotso v. Molise J.C. 155/57 for the principle; and see Lelingoana v. P.C. J.C. 31/46) where the phala remains a mere "bugle" or herald and is not recognised as a chief or headman with original jurisdiction. Secondly, land allocation is a public act, and private allocations are both illegal and void; see the Basotho Court at Lejone in Lekhala v. Shishila J.C. 74/65. This require-

ment of publicity is a common feature of Sotho law (see "A Case of Night-Grazing" in Chapter Three, and the alienation and allocation of the family estate, below, Chapter Six), and is essential for evidential purposes. Thirdly, land is allocated through specifically appointed land-issuers, baabi (sing. moabi) and not directly by the chief. These persons are required to have a full knowledge of previous allocations, and to act as the chief's executive agents in taking or identifying a vacant or forfeited land or lands, and supplying the information about lands that the chief needs in order to make his decision. They also go with the chief or headman or his phala to point out, publicly, the field in question to the person who has been given it. It is the law that the chief must work through his baabi and not directly and by himself (Paramount Chief's Court in Monne v. Rabolinyane J.C. 570/52). Formerly, the baabi were discretionary appointments, and there was clearly no way of determining what they chose to remember, misremember or forget. This represents one of the ways in which chiefs can manipulate land, and render their subjects' tenure less well-protected than the "rules" make it appear. Examples abound -- indeed, disputes over the facts of allocation are countless -- and a not untypical illustration will suffice. In Mthembu v. Monare J.C. 272/63, Chief Letsie Theko allocated a site to Monare near the

village of Sebaboleng (Maseru). Monare built on it, and then Letsie claimed the site back. His land-issuers, one of whom was his paternal uncle Mosuoe, claimed that they had allocated the site to Letsie himself (in itself a perfectly valid procedure), and that Letsie had then commissioned Mthembu to build on it. The present writer took part in this affair, and there is little doubt that Letsie and his chiefs were attempting to go back on a previous allocation. A judgment of the administrative court was produced making this fairly clear. One of the easiest ways to deprive a man of his land is to declare that it had never been allocated to him, if complaisant land-issuers can be persuaded to do this, as often they can. One particular device is to argue that the land was not formally allocated but only lent. (What is at issue here is not the loan of land between subjects, but a temporary loan of usufructuary rights by a chief to a subject.) In Morie v. Mokhesi J.C. 211/64, Tseliso claimed that he had been allocated his grandfather's land, and that during his minority it had been temporarily allocated to others. The loan (mokobobo) had lasted no less than twenty-three years, but the plaintiff was now anxious to resume his land. The lower court at Setleketseng supported Tseliso, but did not consider the principle involved. On appeal, the Central Court at Matsieng stated that "mokobobo does not exist in our law... it is not true that a person can

be allocated a land temporarily". But the temporary use of land, for short periods, is another matter, and would not constitute unlawful mokobobo. Several examples of such loans will be mentioned below. The court may have disliked the custom, but it undoubtedly exists. A different issue altogether is involved if such loans could last for twenty-three years; this would undermine the whole system of land administration and would enable any allocation to be treated as temporary and revocable.

Under the new (1965) constitution, land-issuers are no longer intended to be discretionary appointments by the chief. In terms of sections 90-94, local baabi are to be elected at a pitso (general meeting of all subjects), and are to form a consultative council with whom the headman must act in deciding all matters of land allocation. A pitso of the ward within the jurisdiction of the immediately superior chief elects an advisory board to hear appeals from the subjects of subordinate headmen. Second level appeals are heard by an advisory board elected by a pitso of all the inhabitants of the Principal Ward. From the Principal Ward level, appeals go to Motlotlehi. Similar procedures apply to appeals against deprivation of land. This move to democratise land-administration is accompanied by an attempt to formalise it by requiring that applications for land, notices of appeal, and notifications of allocation or

forfeiture must be in writing, and that records of all allocations, deprivations, procedures and appeals must be kept. Evidence is not available to gauge the general operation of this complex system generally. However, by January 1970, no appeals had been notified to Motlotlehi (11); and there is evidence that the machinery is not fully operational (Ashton 1967: xxx f., but see also Hamnett: 1967a). In Masite, a village pitso was held in 1965, under the Land (Advisory Boards Procedure) Regulation 1965. The headman, who is not gazetted, proposed six people for election to fill the five vacancies. The system of election, which seemed to be locally conceived, was an interesting one. The President was chosen first, and then all who had voted for him retired; the remainder elected the second member, and those who voted for him retired, and so on. The figures were approximately 60, 25 and 15 for the first three places, which nearly exhausted the total attendance, about 100 people having now voted. All therefore came back, and the procedure was repeated for the last two places. This system was seen as ensuring reasonably fair representation for minority groups, where a more straightforward election would have meant that the strongest voting group would have secured all five places. One of the five elected baabi is supposed to attend appeals, not as a member of the appeal board but as a witness of lower level events. The ward pitso was

dominated by 'Ma-Bereng, the wife of the Principal Chief (Mohlalefi) who was still in gaol following the shootings at Rothe in the previous year (Chapter Three, note 9). This was so in spite of the fact that, at Rothe, written voting papers were used, on which those attending the pitso were to write the names of five candidates from the twelve nominated. Of the five elected, one (Masite Bereng) was already the president of the five first-level baabi in Masite (where he is also the chief's phala), and had been a moabi under the old system. He is illiterate, and was chosen for his great knowledge of lands in the ward. Of the others, two were liphala in Rothe, and one was elected raleboella (controller of the leboella). Apart from Masite Bereng, all the baabi were from Rothe itself. Of the seven not elected, only one came from Rothe and one from near Rothe. The other five came from other villages in the ward. In 1966, the printed forms were not in use, and all the probabilities are that the system will work much as the previous one did, where the chief is strong enough to make it so. There was evidence that in many places the elections had been abandoned and that there was great difficulty in making the new procedures operational. The baabi for Masite Nek and Ramakau's village are used in common between the headman and the chief, since the fields are, as noted, "mixed up". A joint meeting was held at Ramakau's, and three baabi were chosen, but the meeting

was stopped and the elections cancelled, since political feelings began to run high (Masite Nek is a strongly Congress village).

Land allocation is traditionally made to married men only, and this rule is still relied on by the Basotho Courts, at least when it supports the decision they wish to come to (the principle was invoked as an additional consideration by the central court in Morie v. Mokhesi above); but there is now a tendency for minority and majority to be assessed more in terms of years than of marital status. The norm of three lands, however, assumes marriage to one wife, and there is thus a sense in which an allocation is made in respect of a wife, though not specifically to her. In Setsapa v. Lethuoa J.C. 125/64, Setsapa had privately lent a land to his son Mene. His wife objected, claiming that the land in question had been allocated in respect of her marriage, not that of Setsapa's other wife. The Chief of Senqunyane sent a letter to the court indicating that the field in question had been allocated for the wife involved, and this view of the matter was shared by both the Basotho Courts: the land was ea 'Matseko, "of 'Matseko". In Machela v. Tholoana the point arose in connection with a divorced wife. The lower court (Bela-Bela Local, C.C. 168/63) held that the disputed land had been allocated to the wife, during her marriage, and that as she continued to live on it with her

husband's children, she retained her title. On appeal, the Court at Motjoka (C.C. 19/64) held that though the land was issued in respect of the wife, it was allocated to the husband, and that the divorce had terminated her rights in respect of it. The issue is finely balanced. In Kobefu J.C. 259/63, the Makhaleng Central Court stated that "lands are allocated to the husband and not the wife; it is the husband who will portion them out to the houses..."; and in Matsoso J.C. 247/63, Maja's Court said "lands are the property of a man and his wife; that means that when one of his wives has died, the lands shall be annexed to the remaining wife or wives".

One source of difficulty and confusion here arises from the ambiguity of the word "allocation" (kabo) itself. It can refer to chiefly allocation of land, or to "private" allocation by the family head of assets within the family (see Chapter Six, and Laws of Lerotholi (1959) Part I sections 11-14). These private allocations are principally to houses (matla, malapa) but can also be made to sons or brothers, especially where the mere use is involved. Thus, even a ts'imo (land), though not part of the estate (ts'imo hase lefa), can be allocated to a particular person; and since lands are issued in respect of marriage, this has particular force. It is a delicate matter, evenly balanced either way, whether such internal family and household arrange-

ments are matters that carry over into the question of chiefly allocation of land to a subject. This is all the more true in so far as the chieftainship itself is still conceptualised in at least partly paternal terms, and indeed in some smaller villages the roles of headman and household head are virtually fused, the "political" and lineage positions being both empirically and analytically inseparable. But the private allocation of lands is a regular feature of Sotho practice, even where the two domains are distinct and seen to be distinct. Josias Thabo died in 1934, having three lands in Masite. His eldest son David was already married and had two lands. His younger son Edwin was a bachelor and had none. David said, "I took one of my father's lands, and made up my lands to three. I gave two to Edwin, who was married now, and he got a third one from the chief". (It was, in fact, apparent from further questioning that "I took..." and "I gave..." definitely included consultation with and permission from the chief. This aspect is considered below, in the discussion of the quasi-inheritance of land rights. What is in point here is the way in which fathers, husbands and heirs make their own allocative arrangements (ratified though they are) within their families of origin and procreation). It is normal and regular for lands to be allocated to houses by family heads, and these acts

are expected to survive the head in at least some of their effects.

The "ideal" allocation of three lands refers to a man with one wife (12). For each additional wife, there is an "ideal" of two further lands. Although there is a positive correlation between household size and lands, it does not, on average, reflect this ideal and many households with large numbers have fewer lands than the ideal suggests (see annex to this chapter, especially Fig. 3 and Table 4). Nevertheless, the statistical correlation, while not reflecting allocations directly proportionate to numbers of persons, suggests that the chieftainship does on the whole match lands roughly to size. As has been noted, polygamy is now very rare, at least in its formal sense, and large households are more likely to consist of brothers and their wives and sons and their wives than of polygamous wives and children. A large family group, such as the Moeno's in Masite Nek, can achieve economies of scale by taking the household economy as one unit, which go some way to make up for the sub-ideal allocation of lands. The Moeno's themselves, thanks to their established position in the village and Philemon's status as headman Chitja's phala, are in fact well provided with lands, and Philemon, as head of the household, is given a more or less free hand with the household fields. The seven nuclear and residual

families who live in the consolidated Moeno site number about 25 persons, of whom five or six live away, either in the Republic or in other parts of Basutoland, and share a total of some seventeen fields. Chitja has no garden, and only three lands; even these he share-crops, for reasons noted in "A Case of Night-Grazing" above, section two.

The kind of economy which a large household can achieve can be seen by contrast with the case of small households, whose womenfolk sell small quantities of corn to find cash when they need it for taxes, school, hospital expenses, or other demands, only to buy back later from the same store at a higher price. It often happens that two women will enter the store together, one coming to sell, and the other to buy. The store, in effect, hands over the seller's corn to the buyer, and charges the latter a mark-up of 15 per cent or more. An integrated household can avoid these diseconomies by balancing its own needs and resources without making a cash transfer to the trader for the nugatory service of weighing and warehousing the corn.

Although a married man has formally entitled himself to a full allocation, he is unlikely, even if shortages and other constraints do not intervene, to receive it if he continues to live at home, bringing his wife with him. He will be much more likely to receive one or two lands, and will be given the full complement (if at all)

when he moves out to establish his own lelapa. This incremental allocation is well adapted to the changing needs in the developmental cycle of the family. At first, before children are born and when they are very young, fewer lands are needed. As the children grow, more lands are required, and the children can help with the household economy, especially as balisana (herds). Quite often, by the time the father dies, the older sons have moved away, and the youngest son may stay at home (with the widow, if she is still alive) and inherit the site. Such a person is known as the toeba ea lerako (lithako), the "mouse among the ruins". But though this is a recognised practice, there is no rule of ultimogeniture in Sotho law, and the youngest son cannot claim to inherit the homestead or huts. Meanwhile, it is not a clearcut matter where the fields "belong". A father will "retain" more fields than he needs or is entitled to, in respect of married, or supposedly about-to-be-married, sons. This is once more an area of uncertainty between chiefly allocation to a subject and "private" allocation within the family. Khadebe -- a second generation immigrant to Masite Nek -- has three sons, one married son working in Maseru, one married son living at home, and one unmarried son living in Matelile. Although a recent arrival and of Nguni origin (his name is phonetically impossible in Sesotho) he established a remarkable position for himself in the

village, partly as a result of his somewhat forceful personality. His brother married a Moeno girl and had no issue. Before his death, he sold his hut and dwelling site, but failed to clear the transaction with the chief. Khadebe was thus able to claim the site himself (sites are not lands and are inheritable in a restricted sense to be discussed later) and put his married son in it. He holds ten lands, and argues that some of them are for his son in Matelile, whose marriage he claims to be due in the not very distant future; others are for his married son in the brother's site. Both sites have gardens, and share the same kraal for their few cattle. The eldest son, who is an interpreter in Maseru, has left his wife and children with his father. This is an example of a man who has been successful in all his efforts; and it is pertinent to note that his good fortune in respect of his salaried son, his sites and his gardens has not resulted in his receiving fewer lands, but more.

Nevertheless, a headman will sometimes take into account the possession of a garden, particularly a large one, in considering allocations. The applicant will resist this, and argue that sites and lands are legally in quite different categories. Sheddick notes (1954: 77, 183 ff.) that Basotho make this insistence, but ignores the question of the land-issuers response to it (see also annex to this chapter). This probably

accounts for the fact that some gardens are under-used. People who could maintain themselves out of a garden, like the Hlabi's in Masite Nek, would by doing so prejudice their right to receive or retain their lands. Since sites such as gardens are tenurially much more secure than lands, as will be seen, they can be allowed to deteriorate and remain unused or underused, and lands cultivated while they are there: for the garden remains with the resident owners more or less unconditionally.

Other considerations taken into account in land allocation are length of residence in the village, birth in the ward or caretaking, and kinship links, preferably agnatic, with those who are already established. Other factors can also weigh. When Josias Thabo came to Masite, he had some cattle and was accounted fairly well to do. The chief therefore gave him some stony ground (he was a stranger, too, and could not claim the best) and told him he could have what he could use. He improved the land and created a large field. His son David refuses to give any of it up, and points to the circumstances of its allocation. It would be unrealistic to omit one further factor in addition. Although land allocation is, in law, a gratuitous act, there is an abundance of evidence that many land-issuers expect and receive payment for giving out fields. It proved almost impossible to gain specific information

on this topic, since not only the chief but the landholder would never admit to a transaction of the kind. It was always a question that arose in another village, or a story that was told about a relative or friend. Nevertheless, there is no real doubt at all that land allocation is subject to this form of "corruption", and that the incidence of cash or other inducements to chiefs is widespread. These inducements cover a wide spectrum, from simple bribery at one end of the continuum to the proffering of respectful gifts or services at the other. In the latter case, there is no clear distinction between "improper" inducement on the one hand and the simple expression of allegiance on the other. "Good" subjects deserve land more than "bad" ones; the abolition or attenuation of chiefs' courts and compulsory letsena (labour services) has modified the criterion of what constitutes these qualities, and opened the system to what in many cases is clearly an abuse that works powerfully against precisely those who are in most need.

The Unit of Allocation

In the simplest sense, what is allocated is a land, a defined area of ground. Sheddick, however, prefers to analyse allocation as involving a "production unit", specifically the arable rights over a cadastrally defined land parcel, rather than the land parcel itself

(1954: 3 f., 10 f. and passim). This distinction is drawn because of the right of stover (gheme) in terms of which, after the harvest, the fields are opened for the common grazing of the stalks. The right of stover is not allocated to the landholder, except in so far as he shares it as one of the entitled community (13). A man cannot graze the stalks of his own land without opening it to all in the community. One consequence of this is that lands may not be fenced, since as soon as it is opened to stover, all may use it. However, in some areas at least, including some within the ward of Rothe, the chiefs have met and formally agreed that a man can divide his field into strips, rotating his crops, and using stover at various times of the year. In such a case, he can graze his own cattle without permitting others to do so, but he is not then permitted to take advantage of the general gheme after harvest. Moreover, there is a gradually growing tendency to tolerate the ploughing-in of stalks, and even for a man to harvest his stalks and store them as winter fodder.

The distinction between different production units has undoubted analytic value, as Sheddick's whole study makes clear, but it is possible to make too much of it in relation to arable and stover rights. To insist on it beyond a certain point is to imply, even though not to entail, an indigenous view that does not in fact exist.

People see the situation as one in which they are allocated a land, subject to certain obligations: e.g., it is specifically for cultivation, and not for building on. (David Thabo tried to get permission to fence and build on one of his fields, but Mohlalefi forbade the project, saying that Basutoland must not be turned into a "nation of farms".) It is also subject to the right of stover, but this is seen as a burden on the land, rather than as a separate unit of title.

Loan of land and other de facto interests in land

In spite of the hostile attitude of the Basuto Courts, at least to a very long loan (mokobobo; see the case of Morie v. Mokhesi above), land is not infrequently lent or temporarily allocated -- it is better, anyway, that it should be used than not, though in disputed matters it often lies uncultivated, and the courts used to order this.

This may take the form of a temporary allocation from a chief to a subject, where a further complication is introduced if the land in question is regarded as the chief's "own" land, and if it forms part of the masimo a lira, chieftainship fields. But a loan of land may also be made between subject and subject. In these cases, a consideration is nearly always involved, except where the purpose of the loan is to maintain title during the landholder's absence or to provide for

dependant kin while the landholder makes his living differently or elsewhere. All such loans, however, require the consent of the chief or headman who administers land in the area. Where a consideration is involved, this can take many forms. One landholder in Masite Nek has lent part of his land to a member of a nearby village in exchange for driving-lessons. In other cases, a straight payment of cash or the setting-off of a debt are involved. The cash transactions are not legal, however, if they involve the effective transfer of rights in land and to use land in exchange for a consideration in money or commodities. But the issue is not, in fact, so simple, since there are many arrangements, notably share-cropping, whereby what is transferred is a right to part or whole of the produce of land. Moreover, what is obtained in return for this, by the landholder, is frequently the use of a plough, of oxen, of labour or of a tractor, without some or all of which the land could often not be cultivated at all. There is no real discontinuity between the widely-found and quintessentially traditional practice of cooperating in land use on the one hand and entrepreneurial share-cropping on the other. It would be quite misleading to suggest that the inhabitants of Masite Nek were given to mutual cooperation in any general way: rather the reverse. Essentially, the different households tend to perceive their socio-economic

situation as "zero-sum", in such terms that one man's gain is regarded as almost bound to another's loss. But particular relationships of cooperation are widespread and institutionalised, operating sometimes on a neighbourly basis but more frequently on a basis of agnatic or cognatic ties, or of affinity (14). Some less structured forms of cooperation between wider groups also occur; a man can announce a letsema, or work party, for hoeing or harvesting, in return for which he will provide food and beer, and sometimes cash. But ploughing arrangements are generally more particularistic. They may take the unilateral form of a son ploughing for his widowed mother, or a man helping his daughter-in-law during her husband's absence. A man may mafisa his stock, and accept assistance in ploughing in return. Two or more households, none of whom may have sufficient oxen separately, may have enough together, and arrange to plough each other's lands in turn. Unequal contributions may be paid for in cash, in kind, or by rendering other agricultural services at another date. At this point, the economic inequality of the partners begins to make itself felt in the distribution of the product, and there is an analytical progress from this arrangement to a more openly exploitative relationship between the parties. Full share-cropping (seahlolo) can mean that a man with lands but no means of ploughing them and (for

any reason such as recent arrival, unpopularity or dearth of kin) no accessible sources of cooperation, and no cash to hire a ploughman, is obliged to enter into an arrangement with an entrepreneur, whereby the latter ploughs the lands and takes half the produce. The typical entrepreneur has lands of his own, and owns or hires a tractor, using it to acquire shares in a considerable number of fields, both inside and also outside his own ward. According to the 1960 Agricultural Census Reports, of all holdings, in 34.2 per cent of cases the holder used his own stock and labour (the proportion of holdings doing so rising from 18 per cent in the smallest holdings to around a half in the larger ones); 17.6 per cent operated the land through the family unit, and 11.2 per cent worked with unrelated families. Thus, about two-thirds (63 per cent) of holders appeared to plough either without help or in terms of basically non-exploitative arrangements. But in about one-third of cases (31.8 per cent) (15) a share-cropping arrangement was used which in principle involved a bargaining situation between parties of such a kind that the economically more powerful of the two would stand to gain -- and from this position déjà prise he would be in a position to strengthen his market situation still more, while reducing the other's chance to improve his own. This does not mean, however, that the relationship is always

directly exploitative, if it is exploitative at all. Thus, Chief Mohlalefi Bereng share-crops some of his fields to Mahlaku, not because he is weak, but because he has more fields than he can use. It is however complained locally that he should allocate more of them to his subjects, instead of keeping them and lending or share-cropping them out; and the arrangement has also had the effect of enabling Mahlaku to enter into arrangements with poor or feckless landholders, where a direct element of exploitation can be said to enter (16). In Masite Nek, the leading resident entrepreneurs were Mahlaku and Moroeng. Moroeng has arrangements with about fifteen other landholders, not all of which however are on a commercial basis. He has fourteen cattle and five horses and owns agricultural implements such as cultivators and harrows. He is a blacksmith, though he no longer works as one, and can repair his own equipment. Mahlaku, whose name has occurred several times before, is a hard-working and intelligent man who has built up his little business as a small shop-keeper in the ten years that he has lived in Masite Nek. He has three lands in Masite Nek, and has kept the three he had at his former home at Thaba-Chitja. He is a creditor of headman Chitja, some of whose land he share-crops; as has been noted, Chitja spends a lot of his time at Mahlaku's café drinking sorghum beer (kaffir-corn beer) and is almost

continually in debt. As has been seen, Mahlaku also share-crops part of Chief Mohlalefi's large field in Thaba-Chitja. His son married the daughter of Rantsilonyane, reputedly the richest man in Masite Nek, with sixteen cattle, six horses and donkeys and about seventy sheep and goats. But the most successful local entrepreneur does not live in Masite Nek at all, but in Rothe, where he has established himself as a small businessman in an internationally recognisable sense, with the help of his brother, a doctor in Maseru. He runs an authorised bus service, owns a car, and possesses tractors and other expensive equipment; he and his brother have extensive interests in land, extending outside not only the local ward at Rothe but into Matsieng and very probably other areas as well. Rural entrepreneurs (or "capitalists") are thus able to build up large de facto landholdings, the nominal landholder sometimes being little more than an unpaid labourer on his own fields. This development in effect sidesteps the customary law of land tenure. It cannot be said to be consistent with it, since it presupposes a form of social structure and a pattern of social and economic organisation of a kind entirely inconsistent with those that underlie customary law; yet it is not specifically in breach of any particular and definable provision. Little is known about the scale and total impact of these entrepreneurial

arrangements in the nation as a whole. They tend to be somewhat invisible, since people do not reveal them freely, and the structure of systematic statistical inquiry is not well adapted to uncover them, much less to identify the point at which a basically co-operative if unequally balanced relationship yields to a commercial and entrepreneurial one. Nevertheless, this excursus indicates that the actual structure of control of land resources cannot in principle be read off from the norms or even the rules of customary law.

Land Deprivation

Land allocation can be regarded as involving the diffuse "right of avail", as Hughes calls it (1964). No specific claim, in principle, exists such that a particular man can call on a particular chief to allocate him a particular land. Land deprivation, on the other hand, is specific and particular, since here a particular man is losing a particular field at the hands of a particular chief. Again, land may be allocated or withheld for general or negative reasons: "there is no land, you are not my subject, there are others with a prior claim, I will see..., come back next year". But land can be lawfully taken away only on positive and specific grounds. The basic ground is that a "remover" (mofalali) forfeits his rights automatically. As has been remarked above, death counts as removal (17), but simple physical absence

does not, title being without any question maintained by a wife or son, but also in many cases by more distant agnates or other kin. Removal includes or overlaps with the concept of allegiance. Subject to the important qualifications of fact discussed in the previous section, a man cannot hold lands under two different chiefs or headmen. If he attempts to do so, he stands to forfeit one or other or even both of his holdings. Removal and dual allegiance strike at the basis of landholding by undermining the links between political allegiance, residence and access to arable resources (18).

The incidence of forfeiture for non-cultivation is difficult to assess. As in most land-disputes, the case becomes visible when a man finds another ploughing his land, and the issue turns on whether the chief had properly reallocated it to the interloper. In many cases, removal and non-cultivation go together, but the point does not, in the nature of the case, cause a dispute, unless the remover returns and claims his lands again. The practice in the Masite area is that after a land has not been used for two years, the holder is warned, and if he fails to heed the warning the land is taken the next year. Such land may be called moshoqa (land cultivated for the first time after being broken up the previous year). Thite, strictly, means virgin land, but current governmental

rules of soil control are thought to require the permission of the "master of lithite" before moshoqa can be put under the plough again; in fact, the chief and baabi will often decide. Land inspection should be carried out annually by the chief with or through his land-issuers, but the actual practice varies.

Deprivation on the grounds that a man has more than is sufficient to maintain his household (lelapa) rests on the underlying norm that mobu ke oa sechaba (land belongs to the nation) and is in principle available for the sustenance of all. What is "sufficient" depends partly on the size of the lelapa, and this in turn is partly a function of its developmental cycle. If a bachelor has any right to land at all, and the point, as has been seen, is controverted, he would not be given more than one or two. A married man, especially when he sets up his own establishment and has a child, will if he is lucky receive the "ideal" three, and if he is a polygamist may look for more again, as he may also do if, though monogamous, he has many dependants. But if these dependants include sons, then as they grow and marry, the allocation to the household head will be in effect to the adult sons. As was noted, there is often an area of confusion here, between the father's "private allocation" to his son and the "public" aspect of allocation by the chief. Radebe in Masite Nek tried to take advantage of this,

claiming that his seven lands were needed "for his son". Then the son applied for lands himself, and Radebe was found out and made to hand over some of his seven. (Radebe had been a land-issuer, and was able to get away with his accumulation. When he had a difference with the chief and lost his position, his good fortune came to an end.)

When the father dies, then although the widow retains her land rights, she loses or is liable to lose one of the "ideal" three, two being now considered sufficient for her needs. In fact, she may well be left with only one. But if new needs are anticipated, the allocation may be left alone. It has been seen how Khadebe speaks of his son's forthcoming marriage in order to keep his lands; and 'Maliketso (the widow of the younger brother of the entrepreneur Moroeng) has kept all her three lands, in the expectation that a son of her own family of origin will marry and come to live with her. Being a sister-in-law of Moroeng she has no difficulty in getting her lands ploughed, but some widows would not be able to cope with more than one or two fields and so would lose them anyway.

A special problem arose in the case of Thabana, an evangelist in Masite ward, who had three lands allocated to the church as well as three of his own. The chief took the church lands away, but since the church does not remove or die and thus has a virtually

perpetual title, he lent them out on a temporary allocation, allowing a landless family to use them. Had Thabana given up his own lands, he would have been badly placed when he retired from his post (19).

A general feature of the right to deprive a man of surplus fields is that it can mean that a man who by good husbandry and hard work increases the yield of his holding may forfeit one of his lands. It will be recalled that Josias Thabo and his son were confronted with this, but resisted it on the ground that Josias had been given stony ground and told that he could keep as much as he could use. Wallman (1969: 108-9) gives instances of similar fears. The problem is, at least partly, recent in origin, in as much as it is only since improved agricultural methods have become available that any qualitative difference in yield could be readily achieved by those able to take advantage of them. It is also the case that a "progressive farmer" can often look for protection from the government. Certainly, Phiri would not have made such extensive investment in his farm near Thaba Bosiu had he not secured permission to fence it and to exclude neighbours from grazing the gheme, and obtained some convincing guarantee of security of tenure. But such farms are very rare, and different considerations apply to ordinary cultivators. A man who does particularly well risks becoming the object

of envy or of witchcraft accusations, and in any case will immediately become the prey of less prosperous kin -- for whom he will not be able to obtain more lands, since his own production "suffices". Basotho dislike and often resent the way in which they become the victims of their own prosperity in this way, but still often find the pressures hard to resist (20). In Masite Nek, Moruti Hlabi is unpopular, and finds that when he issues an invitation to a letsema (work party), very few present themselves. He admits that this is probably because when he came back from the war in 1945 with his gratuity, he "stinted people", instead of showing generosity. Unpopular people can find their crops burned or grazed down in the night, their cattle loosed from the kraal, or even their house set fire to while they are sleeping in it (21).

These grounds of deprivation leave much room for actual or felt injustice, and much scope for manipulation by chiefs and land-issuers. Land disputes often reveal a situation where a man has quite simply been deprived of his land, but where he can find no witnesses willing to speak to his title to it (cf. the case of Mthembu v. Monare J.C. 272/63 above). The uncertainty surrounding what it is that constitutes removal (Makibi v. Mabeko J.C. 11/56) and how many lands are in fact "sufficient", means that the courts are often disposed to leave the matter in the hands of the chief if no

compelling evidence can be found. It is also the fact, of course, that when a chief takes a land away from one man and gives it to another, he automatically acquires an ally in the new beneficiary. The loser has a fight against both his chief and his supplanter, a state of affairs that has been aggravated by the insistence of the Judicial Commissioner's Court that an aggrieved person must sue the alleged interloper and not the chief (though the latter or his land-issuers may be the principal witnesses). It can also mean a reversal of the onus of proof, at least before the judicial courts, since it is usually up to an evicted person to prove that he has the right. The possibly unlawful interloper does not need to prove anything, unless his invasion was flagrant. The administrative courts and quite often the Basotho courts take a broader view of proof and do not confine themselves to a narrowly accusatorial role (see Chapter Seven). Nevertheless, the effect of the courts' view has been to favour the physical landholder, and this can militate against the interests of a wrongfully expropriated subject (22). However, the introduction of the chief as witness raises the questions of whether the chief or his agents had acted properly in re-allocating the land -- and indeed, whether the chief had authority to issue the lands at all. In Moeno J.C. 214/64, it was seen that this could depend on whether the chief acted "through" his subordinate,

or sent his baabi directly into a headman's ward. Lands may also be issued by an ungazetted headman or even a mere phala, and though the courts sometimes endorse this (e.g., the local court in Majara v. Seetane J.C. 131/65) they much more frequently do not. A brilliant attempt (see Khati v. Jonathan J.C. 149/51) to argue that ungazetted headmen, though without rights under the proclamation, retained customary rights derivative from whichever superior chief had authorised them, was foiled by the High Court in Nkhasi 1955 H.C.T.L.R. 39; but this does not erode the position of chief's messengers, on the previously mentioned principle of legosa la morena ke morena (a chief's messenger is the chief himself). In Makibi v. Mabeko above, there was some further confusion between the executive and administrative aspects of allocation, in that the claim to "issue lands" may mean either to be merely a moabi, or else to make decisions as to allocation; but a moabi may be vested with an authority to make decisions too, and though the Judicial Commissioner's Court may not like this, it is a customary practice of unassailable legality in traditional terms (see Paramount Chief's Court in Phohleli v. Nkhema, C.A.C. I Matsieng, C.C. 256/61, where the maxim legosa... was quoted in support).

The security which the Laws of Lerotholi purport to offer is thus deceptive. Landholders do not feel secure, and the volume of litigation indicates that this

feeling is amply justified. No systematic count was taken, but probably over half the appeals to the Judicial Commissioner involved land disputes (as distinct from area disputes) as either a principal or ancillary feature. Where they do not involve a question of law, of the types considered in this and the preceding chapter, they nearly all take the form of a direct confrontation by opposing witnesses as to the particular facts, each side claiming that the land was allocated to himself. As noted before, the chief's evidence normally prevails, except where a previous land-issuer in a past allocation convincingly contradicts him. But it must be stated that in the greater number of cases, the court is simply faced with contradictory testimony, and the chances that a correct decision is eventually arrived at are probably no more than even. The Basotho courts have a tradition of being more willing to act in the matter themselves, either by making an allocation or directing a chief to make one -- in fact, to do what they hold the chief should have done -- but there is no consistency in their practice in recent years, and they have increasingly tended to conform themselves to the received view of the judicial courts, that administrative matters are for the chieftainship. They have thus no way of getting behind the chief's "discretion", and except where there has been a demonstrable illegality, no

attempt or desire to do so. These points are further examined and documented in the concluding chapter, where the progressive bifurcation of customary law into "administrative" and "judicial" aspects is fully discussed.

Land is thus open to bold and illegal initiatives, and frequently the success of a man's bid to take a field depends on the determination of his rival to defend himself. In Masite Nek and the ward of Masite generally, land disputes are very frequent, and often the real test is whether a man will stand up for himself. Re-allocations are often quite openly illegal, but they will succeed if the aggrieved person is too weak or too confused or fearful to act. The Chief may not take a hand in the matter if nothing is done about it; and if he takes the interloper's side, his opponent is obliged to go to the judicial courts, where there are fees to pay and possible costs to incur if unsuccessful. The invader counts on this, and feels that he has little to lose and a land to gain if events go his way.

Quasi-Inheritance of Land (23)

The final topic to be discussed in connection with arable lands is the cardinal maxim that ts'imo hase lefa, "land is not an inheritance". It is a doctrine quoted so frequently and relied on so often in the Basotho courts and by Basotho generally that documentation is

almost otiose. In 1934, the Paramount Chief's Court said, in terms, "It is the fact that land is not an inheritance. It is the property of the chieftainship after death or removal" (Kekane, v. Makhorole J.C. 11/60). In 1945, the same court said, "Land is soil (ts'imo ke mobu), it is not an inheritance (lefa) like animals or goods. When someone dies or removes, it belongs to the chief alone" (Ramabanda v. Nkopane J.C. 134/45). And the doctrine is still reiterated many times in a year. It was accepted, over-interpreted, and heavily relied on by the Judicial Commissioner's Court after Mr W.G.S. Driver's judgment in 'Ma-Dyke's case, Lesitsi v. Mafa J.C. 84/53. This judgment was duplicated and circulated, and has been constantly referred to since. What it offered to the judicial courts was an escape from any substantive inquiry into the lawfulness or otherwise of claims to land that did not fall within the specific clauses protecting widows, dependants and minor sons set out in Laws of Lerotholi (1959) Part I s.7 (5) (a), quoted above. These protective clauses were thus placed on an entirely distinct level and in an entirely different juristic universe from section 7 (5) (b), where reference is made to the priority which the chief is expected to accord to the adult sons of the deceased. The latter situation falls simply within the rule that ts'imo hase lefa, and the courts

leave the decision to the discretion of the chief.

The difficulty here is that it is the case both that land is not an inheritance but reverts to the chieftainship for re-allocation, and that a son has a moral expectation to be given his father's lands (or some of them, or equivalent lands), and this expectation, moreover, is legitimated by customary law. The effect of 'Ma-Dyke was once more to polarise the law into a judicial aspect that can be enforced in specific terms (viz., sec.7 (5) (a)), and an administrative aspect that is left to the "discretion" of the chief (viz., 7 (5) (b)). This fails to reflect the delicacy and subtlety of the customary situation, in which both norms involved (the non-inheritance of land, and the legitimacy of an heir's claims) are maintained, without the one being sacrificed to the other or the two being institutionally, procedurally and juristically separated into distinct categories of right. The norms remain at a high level of generality, and it is when they come to be applied to a particular case that they are disposed, weighted and manipulated in such a way as to procure a result which appears to the lekhotla (court in the Sotho sense) to be the correct and lawful one. The ambivalence here is thus profited from and explored in ways analogous to those described in Chapter Two (where the ambiguities in the law of succession were discussed) and to those that are considered in Chapter

Six below (concerning the respective rights of widows and heirs). It is true that the Basotho courts have always been ready to use the maxim, and true also that, at least since 'Ma-Dyke, they have tended to move strongly to a "judicial" view of their function. But until modern pressures constrained them, they used the maxim, where they did, as one weapon in their juristic armoury among many, not as a way of consigning a wide range of matters to an "administrative discretion" that was not, of course, in any case institutionally segregated from other aspects of the lekhotla's task. For instance, in the first case referred to above (Kekane v. Makhorole), having stressed that ts'imo hase lefa, the court went on to instruct Chief Thakamakula: "There is your subject -- attend to his cry about his children... Chief, there are your children, see to them and give them lands when they come humbly before you.... They live with you and help you and work for you". Similarly, it will be recalled that in the case of Mafetoa v. Mothebesoane J.C. 256/48 (see previous chapter), the Paramount Chief's Court stated that "it is difficult for this court to undo what was mutually done by your fathers". The Judicial Commissioner founded on ts'imo hase lefa and upheld the appeal. The Paramount Chief's Court was capable of doing the same, where it felt that the case was one where the chief's decision was the right one. In

Ramabanda v. Nkopane (cited above), Ramabanda's father and mother were dead; he ploughed the land for eight years, and then left it for ten, before returning and attempting to reclaim it from Nkopane, to whom it had been issued in the interim. The Paramount Chief's Court rejected Ramabanda's complaint, in the words quoted above. But it would be an error to suppose that the Basotho Courts regarded themselves, in the past at least, as constrained by the maxim: they would use it when it served the ends the court was seeking, but they could turn to other and "competing" principles emphasizing succession and chiefly responsibility in other circumstances. (It is true that they could also use ts'imo hase lefa as a way of emphasising chiefly prerogatives, on the lines of the solidarity with chieftainship, of which several examples have been given: cf. Matli v. Letsie J.C. 4/49, Phakisi v. Borena J.C. 69/54, Chapter Three, note 11 and text. But the courts are ready to order an allocation (Matjeketjela v. Theko J.C. 19/47), and even readier, as has been seen, to put the law on the matter to the chief in such terms as to brook no denial (cf. Kekane and Mafetoa above.)

Litigants regularly base their claims on their status as successors to a deceased, and this often slips over into a claim to lefa. Sometimes this represents little more than a daring initiative,

almost foredoomed to failure. It will be recalled that in Lesia's case (J.C. 142/64) the appellant simply refused to state a case defending his action in taking over his parents' lands. In Ndlaba v. Qhobela J.C. 111/65, Ndlaba went so far as to state: "This field was ploughed by my father in 1962 and I reaped it in 1963 after his death. It was never allocated to me. Lands in Basutoland are an inheritance (masimo mona lesotho ke lefa)". But he did not mean this seriously. On appeal, when he had clearly lost, he confessed that "lands are not an inheritance", and sought only to have the damages reduced. As appears elsewhere, Basotho will try their chances in litigation and will quite happily admit that they had no real case. The well-known proverb moa-khotla ha a tsekisoe ("he who stumbles in court is not prosecuted") covers a multitude of such sins. But in other cases, a claim to land based on a right of inheritance is more soberly and responsibly advanced. In Mokola v. Klaas J.C. 243/64, the plaintiff said: "This field was my father's. There is nothing surprising in my ploughing my father's land after he is dead. My father gave it to me. I insist that it is my inheritance" (and cf. Ntebele v. Theko J.C. 67/66). In Mphuthing v. Kubutona J.C. 23/66, Mphuthing in the lower court claimed land as an inheritance on behalf of his widowed mother; this is interesting as a transitional case, since (as will be seen in

Chapter Six) there is a complex relationship between widows and heirs in respect of property that is undoubtedly lefa (cattle, money, goods); and widows have an undoubted right to (some at least of) their husband's lands (sec.7 (5) (a)). Thus the son, on behalf of his mother, claims as heir in respect of what is not an inheritance but nonetheless is an asset to which the widow has an enforceable title.

In Thipane J.C. 183/60, Mokone turned the door of his hut from his chief and was expelled from the area, his lands being allocated to Makirika. After Makirika's death, his widow 'Ma-Thipane continued to use the lands, until she gave them to her son, Thipane. 'Ma-Thipane claimed to have the right to allocate lands, though she was not proclaimed, but the Chief of Peka allocated the same lands to Pius. The administrative court at Peka unsurprisingly upheld Pius's right, but on appeal to the administrative court of the Ward Chief of Tsikoane and Kolbere, the judges awarded to Thipane, "as it used to belong to his late father Makirika". Pius then went to the judicial courts. The lower court at Peka restored the land to Pius, for a confusing assemblage of reasons. One of these was that 'Ma-Thipane was not proclaimed, but another was that the administrative court of Tsikoane had treated land as an inheritance. This is an example of how some Sotho presidents have over-interpreted the rule,

and indeed wholly misunderstood what even the Judicial Commissioner's Court was trying to do; for the Tsikoane Court was acting "administratively", as it was both entitled and obliged to do. To rebuke it for attending to Thipane's being his father's son was wholly to misconceive the issue, since it was precisely the intention of 'Ma-Dyke' that the administration should have a "free hand" in its "discretion". The view taken at Peka Local was, in effect, that an administrative court must act randomly and without adherence to principle, for only so could it avoid the charge that it was trying to "make law". The Central Court at Ts'ifalimali upheld Thipane, on the strength of the Tsikoane khaolo (administrative decision), and noted with approval the grounds on which the Tsikoane judges had reached it. Meanwhile, various other features had entered the case. First, it appeared that Thipane was legally a minor, in that he was unmarried, and so had a stronger claim to the fields in terms of sec.7 (5) (a). Secondly, there was conflict of testimony as to the identity of the lands being disputed. Thirdly, the question of 'Ma-Thipane's right to issue lands arose again. Fourthly, Thipane showed that he had ploughed the land for seven years. The Appeal Court restored the Peka judgment, on the grounds of 'Ma-Thipane's lack of jurisdiction, and did not consider the decision of the Tsikoane administrative court. The Judicial Commissioner upheld the Appeal Court,

evading the question of the Tsikoane decision on the somewhat devious grounds that there was no evidence that the ward chief himself had had a hand in it. In many respects, this is an illuminating dispute. It illustrates several features that occur, separately or together, in many cases over masimo: conflict of evidence over basic issues of fact, such as the identity of a field; conflicting claims by different baabi (land-issuers); arguments founded on long-distant events (the original allocation took place in 1935, and the case was heard in 1959); a long history of suits and appeals, passing from the administrative to the judicial hierarchy; the determination of litigants to exhaust every remedy available; the uncertainties surrounding jurisdiction; the tension between the principle of succession and the principle that ts'imo hase lefa; the ambivalence in allocation itself, as to whether an administrative right was being exercised, or rather a "private" distribution of family resources. These complexities were added to by the cross-winds blowing from 'Ma-Dyke and the other judgments of Judicial Commissioners insisting on the segregation of "judicial" and "administrative" affairs, which introduced confusion and contradiction into the Basotho courts and led them to display an excessive zeal in adhering to doctrines which they failed fully to understand.

It should be clear that it is no part of this

argument to deny or depreciate the customary-law validity of the maxim that land is not an inheritance. It is indeed a cardinal principle of Sotho law, and underpins the whole fabric of land use and administration. But, as with all customary principles, it cannot properly be treated in isolation from other norms, much less relied on as a rule of thumb that enables claims to land to be consigned to an administrative "discretion" falling outside normative control. The institutional separation of judicial and administrative courts has the effect of placing sub-sections 7 (5) (a) and 7 (5) (b) into different and discontinuous categories, whereas in customary law terms there is no such discontinuity. The cases that have been discussed above, and the account of Sotho practice that preceded it, largely based on the evidence of the people of Masite and Masite Nek, suggest that over the whole area of land administration there is a play of norms, general in character, potentially inconsistent in their implications, and that it is in the specification and application of these norms in particular cases that decisions are reached that are at once unconstrained and at the same time lawful (24).

Sites and Gardens (25)

If land is (in the qualified sense indicated) clearly not an inheritance, and certain other resources

discussed in Chapter Six as clearly are, sites and gardens are a transitional category. The relevant provision of the Laws of Lerotholi (1959) Part I reads as follows:

Sec. 7 (7) Land allocation for gardens (lijarete) and tree plantations, etc.

On the death of a person who has been allocated the use of land for the growing of vegetables or tobacco, or for the purpose of planting fruit or other trees, or for residential purposes, the heir, or in the absence of the heir, the dependants of such deceased person shall be entitled to the use of such land so long as he or they continue to dwell thereon (ho aha teng).

The type case concerns residential sites, and most attention will be given to these. Like masimo, sites are a matter for allocation by the chief. To qualify, a man must bear allegiance to the chief (or headman) of the village or place where he seeks a site. If he "turns the door of his hut", he forfeits his rights of residence, and so his site, though he is entitled to take away at least part of his hut or huts when he leaves (26). Removal results in forfeiture, as with lands, but again like lands, title can be derivatively maintained through close kin, including affines; and there is no obligation corresponding to the duty to cultivate. Unless a garden has been abandoned by its owners, it remains with them even if they do not make use of it. Nor can it be taken away from them simply because it is more than is "sufficient

for their subsistence".

These, at least, are the simplest expressions of the law that applies, but they are not wholly without qualification. In Sofeng v. Letsie J.C. 97/62, the lower court at Maja's stated that even though Sofeng "had not elected to remove from the area of Chief Mpiti to that of Chief Letsie, but is still living under Chief Mpiti near this site as their areas are adjacent, he is still entitled to this inheritance of his grandfather". But the tendency has been to insist on a conjunction of residence and allegiance (Maile v. Sekhonyana J.C. 115/63, Letsolo v. khubetsoana J.C. 115/63, etc.), though this is obviously a difficult and potentially inequitable rule when buildings might be of considerable financial value. (Some governmental protection is being provided to cover such cases, however; the traditional law is more appropriate to sites with little or no commercial value.)

In Matsela v. Matete J.C. 243/60, Ramosebetsi was adopted by his paternal uncle, Samuel, and married 'Malithakong, having a son Soabi. Samuel and Ramosebetsi died, and the chief took Samuel's garden, which 'Malithakong now claimed was hers (or hers for her son). Chief Mahao agreed that he had taken the garden, and defended his action by saying that sites at Morija were in very short supply; 'Malithakong had already been allocated a site of her own, and should not be

allowed to keep two, when there were many people with none who wanted one. He was upheld by the local court at Matsieng, which accepted also that 'Malithakong was not a "dependant" of the deceased Samuel, at least since she had been allocated her own garden and building site. Samuel having had no issue, the site reverted to the chieftainship. The central court at Matsieng reversed this decision, pointing out that "a garden is not a land (ts'imo)", and that although it would no doubt be undesirable if one person were allowed to accumulate many gardens, this did not constitute a reason for depriving 'Ma-Lithakong of her inheritance. The case then came before the Appeal Court at Matsieng, where Chief D.M.L. Mojela restored the decision of Matsieng B. In his view, the maxim mobu hase lefa (the soil is not an inheritance) extended to cover a case of the present kind, not precisely in the sense that it covered masimo, but in terms rather of the social interests of the community or the nation at large, and in support he referred to sec. 7 (8) of the Laws of Lerotholi, where reference is made to "land required in the public interest" (melemo ho sechaba). Chief Mahao "was applying a benefit for the people, rather than for one person who would have several gardens to herself.... (He has) the right to allocate the soil (mobu)... and so much the more if he applies this law for the benefit and well-being of the people".

The Court also implied that the provision requiring that the claimant should dwell on the site, while clearly not directly applicable to a garden, meant that one person could not use more than one site, especially if there were a shortage and the Chief decided to expropriate. (The Judicial Commissioner held that "to dwell there" meant only that he must live "under the chief or headman" (27), and that "public interest" referred to communal assets such as schools or roads, not to the needs of other individuals or households. Accordingly, he upheld 'Malithakong's claim.)

However, in spite of the doubts that were raised in this special case of multiple ownership, sites and gardens have a greater security than masimo. This is partly because it is obviously much more difficult for a chief to re-allocate a site unlawfully if people are actually living on or near it, but also because forfeiture cannot take place, even lawfully, except on the special conditions of removal or possibly, as seen, where ownership of several sites is involved. Moreover, not only a son but also an heir can claim. Thus, a brother can inherit a site, if he is heir (mojalefa) to the deceased. It is less clear whether, if the heir is disqualified (e.g., by non-residence or another allegiance), the next in line inherits. Laws of Lerotholi 7 (7) implies that he would not, and the

Judicial Commissioner took the same view (Mosala J.C. 65/59), but some Sotho opinion is that a younger brother would take the heir's place. But in Letsae (Bela-Bela C.C. 20/64 etc.), Motjoka Central Court said that the right of inheritance passed to the heir (or dependants) of the deceased, and that a remover left no heir: the site reverts to the Chief, and only the dependants of the deceased can claim it -- that is, a younger son could not take a "removing" elder son's right.

Sites can be alienated, but since the newcomer requires an allocation, this means that the chief must agree. Whereas in a loan of land between subjects, no consideration should pass, it is not unlawful to sell a house-property. It is not, strictly, the site but the building that is sold, but in fact such transactions are treated very much like a sale of land, except that, as stated, the Chief's consent must be obtained. Residential title is in fact the foundation title for all other rights, and the Chief cannot be required to allow a newcomer to acquire it without his approval. But it is also a need even more basic than the need for lands, and is more easily granted, since it is easier to find a space for a hut or two than to find an unoccupied field. Similarly, while to forfeit lands is a serious loss, to forfeit residence is more serious

still, and indeed carries the loss of lands with it. Of course, the fact that a particular man does not inherit a site does not mean that he loses his rights as a villager and subject; but the fundamental character of residence helps to explain why it is less easily lost and more securely protected than rights over arable land.

In certain respects, therefore, sites and gardens, though still part of the mobu that is oa sechaba, constitute something of a mid-case between masimo (lands) and lefa (inheritance). The spectrum of "ownership" in Basutoland in fact moves in an order that can be extended even further, to show several degrees of individuation. At one end are the maboella, the grazing grounds and qheme, which are open to all in the entitled community and are not allocated to individuals as such. Next, there are the other chief-tainship properties, liremo, or thatching-grass, reeds, and public trees, which are for communal use until they are subjected to specification by individuals, who then (so long as they are resident) acquire an exclusive title to the particular objects which they have cut or plucked and taken to their own use (fructuum separatio). Next, there are masimo, which again are "of the nation" until specified, but which are -- outside the qheme, or stalk-grazing season -- more individual than the liremo, since in the latter case no rights are acquired

over the reed beds etc., and rights are acquired over the items only as they are gathered or cut, whereas in the case of lands it is otherwise; exclusive even if defeasible rights over the land are acquired, and the crops belong to the landholder without fructuum perceptio or separatio. Sites and gardens are more individual still, since titles to them, though still defeasible, are less easily so, and they can pass to an heir or (with consent) be alienated for value. Finally, there are objects of which it can be said that they are in some sense "owned" -- though, as will be seen, it is another question to determine what sense this is, and who the "owners" may be. Lefa (inheritance) falls into this last category, and forms the subject of the following chapter.

EXCURSUS:

Land Shortage in Basutoland

Annex to Chapter Five: Land Shortage in Basutoland

Sheddick advanced a plausible case for treating the alleged land shortage in Basutoland with some scepticism (Sheddick 1954: 183-192). He takes up "the most frequently expressed complaint... that (people) do not hold title to three fields" and points out that acreage, to which the number of lands bears no necessary relation, is the appropriate measure to apply. Sometimes people consolidate holdings, and appear to have fewer fields than before, or they are holders of a status (head of a residual family unit, widow, etc.) that does not entitle them to three in any case. He argues that "there is sufficient arable land available in Basutoland to satisfy all legitimate claims.... The apparent shortage of land may be more adequately explained in terms of the failure of the existing production units (viz., arable fields in this case) and of existing methods of land utilisation to achieve an adequate expendable surplus.... The problem is one of production shortage rather than a land parcel shortage.... The cry for more land arises from the failure of the production units to balance the country's budget. The extent to which this adverse balance weighs upon individual families is partly a measure of individual competence and individual resources.... The net value of a production unit to the individual family

depends not so much on the relative fertility of that unit as on the possession by the individual family unit of certain attributes, the ability to cultivate adequately, the availability of capital equipment and the possession of sufficient resources to enable the family to avoid converting its subsistence production into ready cash only to have to rebuy at higher prices later in the year". He then mentions climatic factors, and points out that "no less than nine of the last seventeen seasons (1932-6, 1941-2, 1943-6, 1948-9) have yielded inadequate harvests" because of too little or late rain, and unseasonal frosts. He argues further that although chiefs may, on the whole, have larger holdings than others, this was partly because they had more people and households to support, and in any case these holdings have if anything decreased in size. "Popular opinion, pre-occupied with attempts to lay all land evils at the door of the chiefs, has largely failed to appreciate the extent to which commoners have been able to acquire direct holdings far in excess of their legitimate expectations. But even more extensive are the indirect holdings of the capitalist farmers (who) have acquired a multiplicity of shares in the production units nominally held by others." He considers that wage-employment ("held to be both easier and more attractive than the hard monotonous grind of cultivating

and herding") has favourable repercussions on land-use, by reducing the need for intensive exploitation of land and permits or imposes a periodic fallow.

"There is no physical shortage of land.... The problem is better viewed as a production shortage."

Sheddick's contribution to the study of land tenure in Basutoland is so valuable that any views he expresses on the subject deserve serious attention. The criticisms that follow imply no depreciation of the value of his study as a whole. Moreover, it must be borne in mind that over twenty years have passed since the fieldwork underlying the report was carried out (p.xv), and that the objective situation has probably changed appreciably since that time. In addition to this, many of the points made are valid ones in themselves, and were well worth some degree of overstatement, if only to challenge the despairing orthodoxies against which Sheddick's protest is made. Nevertheless, it will be argued here that the views Sheddick expresses are probably wrong if applied to modern Basutoland, and are also open to methodological criticism of a more general order, no matter what empirical situation is assumed to exist.

Methodologically, it is open to question whether it is possible or meaningful to discuss land shortage in the abstract, as though it could be detached from the technical skills, social organisation, cultural

dispositions and capital resources of the people who use it. No one who talks of "land shortage" supposes that there is no room to stand up or sit down; they mean that the yield is too small to support more than basic subsistence and that no accessible means of increasing food-production exist other than acquiring more land. In one sense, Sheddick is right to speak of a "production shortage", but this one sense is truistic, since people do not want land for any other purpose except production. (Basotho people have a distinctly instrumental attitude to land parcels and do not form affective attachments to particular fields.) His view ceases to be truistic only at the price of ceasing to be true, in that it then implies that production can be increased by means that are available to the people; but Sheddick himself recognises that this is not so. They do not have the capital resources and have no means of obtaining them. They lack technical skills and only a few are likely to obtain these either. The social organisation of land administration is adapted to a form of "communal" or "national" ownership, which it also reinforces, and this militates against exceptional individual achievement, since such achievement threatens these "communal" or "national" characteristics and thus puts at risk the minimal security currently held out to all subjects. Cultural values underline and support most of these

features of the system. Nothing is gained by positing fields that till themselves or landholders who acquire technical skills and capital resources overnight and as rapidly transform their social structure and cultural orientations. The reductio ad absurdum of the argument is found when Sheddick invokes climatic factors in support of his contention that there is no "physical shortage" of land. At this point "land" becomes an almost purely metaphysical entity, since it is now analytically separated even from its climatic environment. It is hard to believe that any Mosotho has ever regarded "land" in this quite abstract sense either as in short supply or as an object of desire. The "cry" of the Basotho is much simpler -- that if they had more land they would have more food, and that if they cannot get more land they can get food only by working for it in wage employment. Sheddick is perfectly right to state that the latter is the only recourse available, and that is why so many Basotho adopt it. (The notion that life in the South African mining compounds is in any sense "easy and attractive", however, bears little examination -- as does the idea of the "monotonous grind" of subsistence farming. Subsistence cultivators have little to do for most of the year, since there is in fact little to be done, and much of that is done by women. At periods of peak labour demand, especially for ploughing, many wage-

labourers in fact come home to help. It is, of course, true that considerable cultural as well as economic value is attached to working in the Republic, but this is because it is seen as a mark of sophistication and manliness, not because the work itself is seen as intrinsically preferable to the otium cum (or even sine) dignitate of the villages.

Sheddick also seems to overlook the actual physical condition of the land. Much of it is now almost irreparably ruined, and a good part of the rest is so shallow as to be considered only marginally productive in a modern agronomic setting. Gully erosion is catastrophic over the densely populated border lowlands, and there is no obvious way in which the situation can be seen as other than bound to deteriorate. It is certain that the case is now appreciably worse than it was in 1947-1949, when Sheddick's fieldwork was done, but it is also arguable that no qualitative change has occurred to justify the apparent optimism of the final pages of his study. (However, it must be remembered that his was an operational report, among the purposes of which was the implicit prompting of remedial action to the commissioning authorities. It would have been counterproductive to suggest that nothing could be done.)

Even if some of Sheddick's arguments were to be accepted in relation to the situation in the late 'forties,

however, it would be difficult to maintain them thereafter: though here, too, it must be stated that some of the trends which Sheddick identified (such as the growth in disparity of holdings and in "rural capitalism") have continued and been aggravated. The later evidence both bears out Sheddick's particular observations of facts and tendencies and at the same time contradicts the conclusions which he then drew. Population growth is a factor which has certainly aggravated the problems, and it is only recently that figures have been available for this on which any serious reliance can be placed (Basutoland 1956 Population Census; Batson 1960; 1960 Agricultural Census of Basutoland).

As a preliminary, it may be recorded that the geographical area of Basutoland is about 11,720 square miles. According to the 1949-50 Agricultural Survey, only 1,453 square miles were available for cultivation, of which 323 square miles were left uncultivated in that year, leaving 1,130 square miles for food (Morojele 1962: Part 1, p.9). The number of agricultural holdings, on the basis of the 1960 Agricultural Census is estimated at 161,250. Of these, 5,693 (3.7 per cent) are without land but with stock and a further 9,161 are without both land and stock. The following tables exclude the last category, but include holdings without land but with stock, since these are clearly relevant

in a frame of reference directed to the rural economy and society.

TABLE 1

Percentage Distribution of Holdings according to Acreage

Size of holdings	%	Average Acreage
Holdings without land	3.7	---
Holdings with land up to 1.99 acres	16.7	1.23
" " " 2.00 - 3.99 "	25.9	2.99
" " " 4.00 - 5.99 "	21.1	4.92
" " " 6.00 - 7.99 "	13.5	6.84
" " " 8.00 - 9.99 "	7.1	8.83
" " " 10.00 -14.99 "	8.4	12.03
" " " 15.00 -19.99 "	2.1	16.92
" " " 20.00 -29.99 "	1.1	23.24
" " " 30.00 -39.99 "	0.2	35.28
" " " 40.00 acres and over	0.2	56.36
	<u>100.0</u>	

N - 161,250

Mean acreage - 5.4
 Median " - 4.4
 Modal " - 3.3

(adapted from Morojele: 1962 Part 3, p.10)

The skewness of the distribution is apparent from the variations between the mean and the median and modal averages. Morojele comments (*ib.*, p.11) "Although it would appear that an average holding size of 5.4 acres might be adequate... the unequal distribution prevents many (over 60 per cent) of these households from enjoying enough for their needs."

TABLE 2Comparative Distribution of Size of Holdings 1950 and 1960

Size of holding	Percentage of Holdings		
	1950	1960	
0.01 - 3.99	38.7	44.3	(Adapted from Morojele, <u>ib.</u> , p.14)
4.00 - 7.99	39.8	35.9	
8.00 - 14.99	20.0	16.0	
15.00 - 29.99	4.1	3.3	
30.00 and over	0.4	0.5	
	N - 149,800	N - 155,287	

The total number of holdings thus appears to have increased, this increase being mainly in the smaller holdings of 0.01 - 3.99 acres. The percentage of such small holdings has also increased. Morojele comments that "while the number of households with access to arable lands has increased, more and more people seem to be operating smaller holdings than before" (ib., p.15). Moreover, in spite of the fall in the number of larger holdings, the tendency has been towards a more uneven distribution of land overall. In 1960, 4 per cent of households operated 15 per cent of the land, and 12 per cent operated 34 per cent of the land. The following table presents the distribution of holdings in relation to their total area:

TABLE 3

Distribution of the percentage area of holdings by
size of holdings

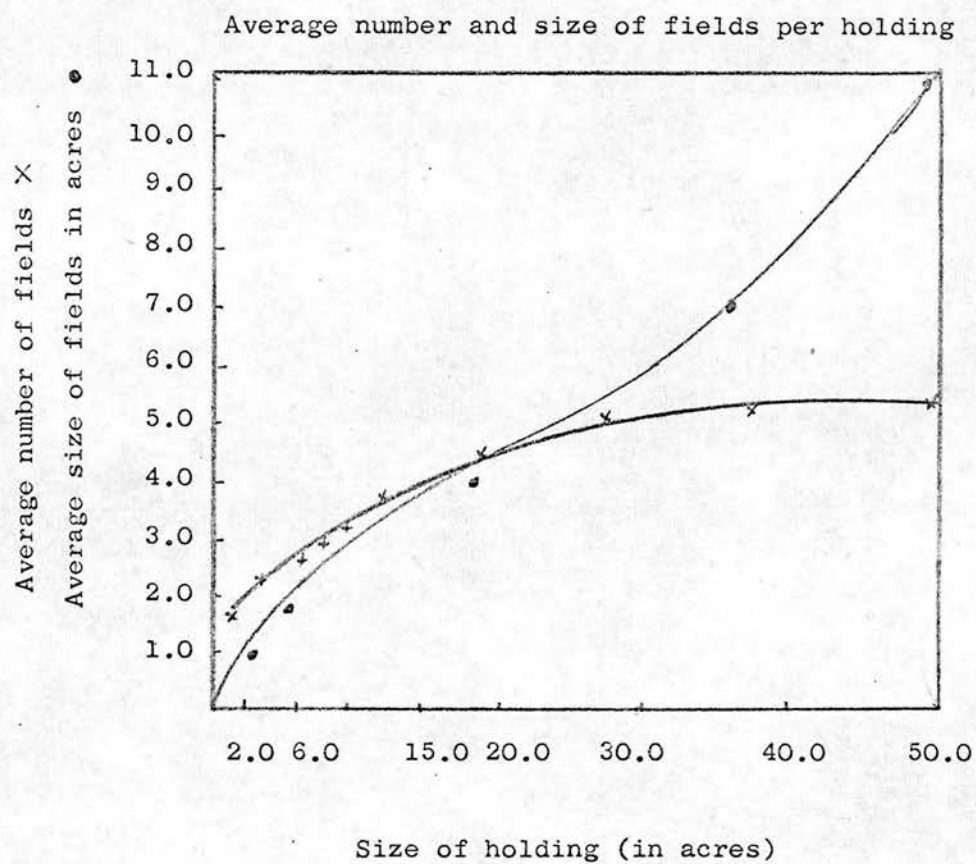
Size of holding	% of total acreage
Holdings without land	--
Holdings - 1.99 acres	3.8
2.00 - 3.99	14.3
4.00 - 5.99	19.2
6.00 - 7.99	17.1
8.00 - 9.99	11.6
10.00 - 14.99	18.6
15.00 - 19.99	6.5
20.00 - 29.99	4.7
30.00 - 39.99	1.6
40.00 and over	<u>2.5</u>
	99.9

Total acreage - 871,687

(Adapted from Morojele, ib., p.19)

Morojele observes (ib., p.23) that the average size of holding is 5.4 acres, and if calculated for all households is 5.1 acres. But part of the reality is concealed by the fact that in certain cases family groups live together in one household. If the average figure is calculated for the simple family unit (y. Morojele 1962: Part 2, Table 56), the average acreage for each rural family is 4.9. If landless people are included, this average again drops to 3.7 acres.

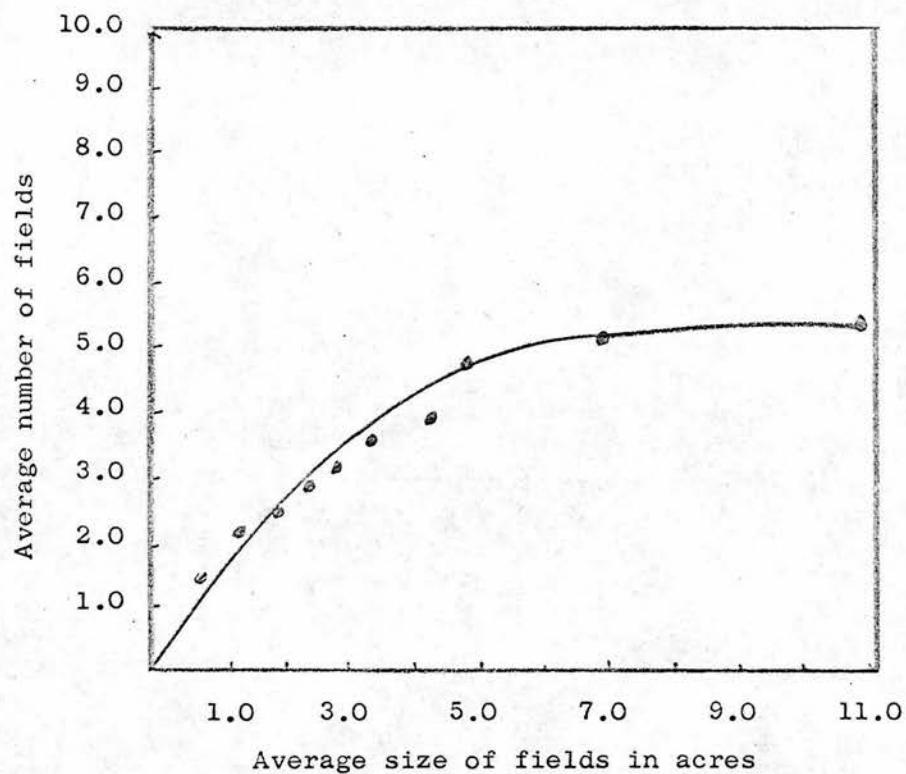
Fig. 1



Source: Morojele 1962: Part 3, p. 50

Fig. 2

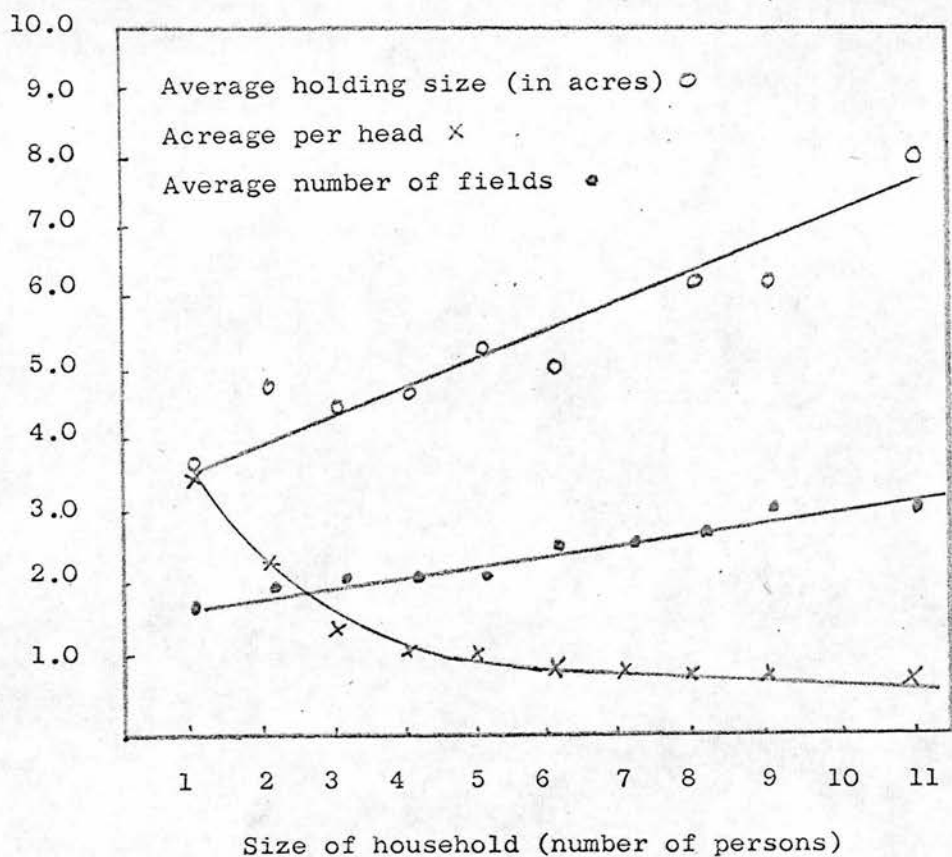
Relationship between number and size of fields

Source: Morojele, *ibid.*, p. 51

Reference has been made more than once to the absence of any logical relationship between the number of fields in a holding on the one hand and the acreage of the holding on the other. The 1960 Agricultural Census provides some material that illuminates this question. Figure 1 plots the size of holding against (a) the average size of fields and (b) the average number of fields. Figure 2 plots the average size of fields against the average number of fields. Morojele comments (Part 3, p.52) that "both the size and number of fields increase together fairly rapidly up to holdings of about 20 acres.... The majority of the smallest fields are found in the smallest holdings. As fields increase in size, the majority are found in the larger holding groups" until they reach a size of about 4.5 acres each. This suggests that those with few fields are worse off than those with many because their size as well as their number is likely to be smaller; which leaves little empirical foundation for the argument that those with few fields might well enjoy a larger acreage overall: proportionately, they will tend to have even less than would be expected if all fields were the same size. This goes some way to validate the apparently illogical Sotho practice of thinking in terms of field numbers rather than field size. While this procedure is no doubt of little value in respect of any given individual, it seems to

Fig. 3

Relationship between size of household and size of holding



Source: Morojele, *ibid.*, p. 59

have an unsuspectedly firm statistical foundation for the agricultural population as a whole.

A rather different picture emerges from the Census data relating to household size. Figure 3 plots the relationship between size of household and size of holding (supporting tables are in Morojele, ib., pp. 55 ff., but are omitted here). From this, it is clear that there is a strong positive correlation between the two variables, a circumstance which lends support to the view that the large holdings do not usually represent an inequitable distribution of land resources: rather, the holdings tend to be large because the households attached to them are large. Indeed, it is apparent from Figure 3 that the proportionate size of holding of the larger households is smaller than for the smaller households, a much lower average acreage of arable land per person being found in the former than in the latter. There is an average of 1.1 acres of land per head in a household of 5.1 persons (the mean household size emerging from the census); this ratio is doubled in households with 2 persons and trebled in those with 1 person, but almost halved in households of 10 persons or more. Nor, of course, should this positive correlation obscure the fact that many households of average and more than average size have no fields or fewer than they need, as Table 4 reveals:

TABLE 4

Percentage of Households with given number of fields by
size of household

Size of Household (no. of persons)	No fields	1 field	2	3	4	5	Total
1	6.2	26.4	47.8	17.3	2.3	--	100.0
2	2.8	23.5	42.9	22.4	7.3	1.1	100.0
3	6.1	23.5	39.9	21.6	7.0	1.8	99.9
4	4.9	22.3	39.7	21.8	7.7	3.6	100.0
5	4.7	22.2	31.1	28.7	11.3	2.0	100.0
6	2.2	19.5	29.8	30.6	11.9	6.0	100.0
7	2.2	19.1	27.8	33.9	11.4	5.6	100.0
8	1.2	12.4	33.3	29.9	13.4	9.8	100.0
9	1.2	9.9	25.9	28.2	14.3	21.5	100.0
10 and over	1.1	10.3	28.7	30.7	10.9	18.3	100.0
<u>Total</u>	3.7	20.2	35.2	26.2	9.5	5.3	100.0

(Source: Morojele 1962: Part 3 p. 57)

N - 161,250

It is apparent that many households are without land, or without sufficient land, in all categories of household by size; and it appears from the figures for arable land cited above that little unoccupied land is available that could raise the net occupation ratio.

(It will be recognised that the existence of uncultivated land does not argue either (a) that it is unoccupied or (b) that its cultivation is desirable. One of the

agricultural hazards in Basutoland is that lands are driven to the limit and do not lie fallow frequently enough from a soil conservation point of view. That apart, it is also obviously the case that full (100 per cent) utilisation of land resources is virtually impossible since demand and supply will not be likely to achieve a perfect geographical coincidence, especially in so illiquid a good as arable land). In these circumstances, many households and families are seeking land which is not available to them, not because a few households have taken more than their share but because the land does not exist. On any operational criterion, this constitutes a "land shortage". This shortage has grave consequences in that it means (as Sheddick says) a "production shortage" in a society whose basic economy and residual security are overwhelmingly agricultural and likely to remain so. The relevant point is that the most critical struggle that marks the life career of a Sotho family or household is the struggle for land: it is, as the lower court in Moeno's case said (J.C. 214/64 above), a matter of bloodshed, and this in itself is the best index of its scarcity.

This discussion has so far left aside two points in particular (both of them referred to in the main chapter) that are relevant to the land situation in Basutoland. One concerns the fact that, as Sheddick points out and Morojele confirms, what may be called

"rural capitalism" has resulted in the aggregation of considerable de facto holdings of disproportionate size by some individuals throughout the territory. In this annex it is sufficient to note that such sub rosa accumulations tend to aggravate land hunger among those who do not profit from them, thus increasing the disparities and generating a submerged class of effectively landless or land-short persons. The second point omitted here is the existence of garden sites and home-stead yards; as Sheddick points out, Basotho think in terms of traditional "lands", and often leave out of account the gardens and yards that they may cultivate quite separately. "A Mosuto holding two fields will often complain of the injustice which robs him of his third field whilst studiously overlooking his possession of, perhaps, two plots and a garden which may themselves exceed the average total size of two fields. This careful distinction between fields on the one hand and plots and gardens on the other is one that must be constantly carried in mind when examining pleas of land shortage and of unfair distribution" (Sheddick 1954: 77). It must suffice here to observe that in the territory as a whole, of the 161,250 estimated holdings, an estimated 37,347 (23.2 per cent) have gardens. Of holdings without lands, only 1.2 per cent have a garden, and holdings with land of 8 acres and above in size more frequently have gardens than those with less than eight

acres. Sheddick's implication is thus squarely contradicted. Moreover, the total acreage of gardens in Basutoland is only about 1,640, or 2.6 square miles -- a clearly nugatory area (Morojele ib., pp. 73 ff.). An economically and productively analogous resource is the "yard around the homestead", which Sheddick treats in the same general category as "gardens". The percentage of holdings with "yards" is 13.2, of which the overwhelming majority have only one. Holdings of 10 acres and above have yards much more frequently than those with less than ten acres. Information is not available to enable any correlation to be assessed between holdings with yards and holdings with gardens, so that it does not follow that the two categories vary together. It is theoretically possible, though in fact very unlikely, that gardens and yards are so distributed as to achieve the greatest possible equalities in their joint incidence. But even if that were assumed to be the case, the impact on land shortage would be minimal. The total acreage of yards is estimated at 14,191 acres. The aggregated acreage of yards and gardens together is therefore about 15,831 acres -- or roughly 1.5 per cent of the total arable area of Basutoland. Important though such resources may be for their "owners", they are of only the most marginal relevance to the "production shortage" in the country as a whole.

Though on both the principal issues of fact (the apparent disregard shown by Basotho for the true size of fields, and the productive contribution of gardens) Sheddick was wrong, he was wrong for the right reasons. The relevant information was not available to him, and he was justified in challenging commonly held views that bore little logical relationship to the then established facts. What is of particular interest is that the intuitions and impressions of the Basotho, though irrational in particular instances, should have proved to be so close to the reality suggested by a systematic statistical inquiry.

THE LAW OF PRIVATE SUCCESSION AND INHERITANCE

The title of this chapter should not be taken to imply that there is a neat distinction, or in many respects any distinction at all, between "private" and "public" law in Basutoland. But it is convenient to use this term as a purely indicative label in the consideration of those aspects of succession that are not covered, or not exhaustively covered, in the chapters dealing with chiefly succession and seniority, and with administrative titles to land. It has been seen that some uncertainty exists as to whether and to what extent issues of chiefly succession can be seen as determined in the same way as issues of succession within a subject lineage, or as issues of inheritance of discrete items of property. The tendency has been to move towards a more "public" set of procedures in issues of chieftainship, especially in the case of the Paramountcy; but this should be seen as part of a continuing process, more apparent at certain levels of hierarchy than at others, and should not be interpreted as any radical theoretical discontinuity between "public" and "private" rights. Nevertheless, there undoubtedly exist certain points where a fairly sharp distinction can be drawn. As is noted in the preceding chapter, the chieftainship lands, masimo a lira, do not belong to the personal patrimony of the chief;

and it is involved in the working of the placing system that the administrative rights of chiefs -- since they can be curtailed and ultimately abrogated when a superior is "placed" -- are distinct from the chief's own possessions and personal rights. The whole of customary land law is posited, as has been seen, on a denial of personal ownership in respect of all titles to land.

This has implications for the rights of subjects, too, since the nature of their rights to land is, of course, crucially different from their rights to cattle, to personal and household goods, and to other items that fall within the concept of lefa (inheritance) (1). Though, as has been seen, there are certainly ambivalences here which recent legal changes have tended rather clumsily and misleadingly to polarise and "rationalise", it is equally clear that notwithstanding the legitimacy of a man's expectation to continue in his predecessor's holding, this is qualitatively different from the specific rights he can claim to whatever emerges as his lefa. Lefa does not indeed exhaust tokelo, but it forms a special area within it.

The present chapter, then, is principally concerned with lefa, and with those other incidents of succession and inheritance that are related to, or derivative from, this category of right.

I

Much of the discussion will refer to two texts, one of some antiquity, and the other, though much more

recent, still to a considerable degree reflective of customary law. It is therefore convenient to set these out in advance. They also serve to indicate the general area with which this chapter is concerned and at the same time to draw attention to some substantive issues that call for exposition and clarification.

The first passage is taken from the evidence of George Tlali Moshoeshoe (a junior son of Moshoeshoe) given before the Commission on Native Laws and Customs of the Basutos in December 1872 (2).

"What is the law with regard to inheritance? -- Each wife has a separate establishment. The husband apportions cattle to each house; the eldest son in each house inherits all the property which has been allotted by the father to that house. A widow can inherit cattle belonging to her house in case she has no male children at the death of her husband. Children belong solely to their father; when he dies, they are left in the charge of the mother; the dowry cattle (3) of the girls is claimed by the eldest son of the house to which they belong, and is divided between him and malome (4) in the usual way. Although I have said the eldest son of the house claims the cattle, I must explain that he is only acting for his mother, who has charge of all her deceased husband's property during her lifetime belonging to the house, but at her death, then it devolves upon the eldest son of the house".

The second passage consists of sections 11 to 14 of the 1959 edition of the Laws of Lerotholi (Part I).

Heir (Mojalefa)

11. (1) The heir in Basutoland shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child of the next wife married in succession shall be the heir.

(2) If there is no male issue in any houses the senior widow shall be the heir, but according to the custom she is expected to consult the relatives of her deceased husband who are her proper advisors (baeletsi).

Minor heir

12. (1) When a man dies leaving an heir who is a minor, the person appointed as guardian of the heir and administrator of the estate (molisa oa lefa) shall keep a written record of the administration of the estate, and this record shall be open to inspection by the paternal uncles (bo-rangoane) and by such other relatives of the heir (bang-ka-mojalefa ba bang) as are permitted to do so by Basuto Law.

(2) No property belonging to the estate shall be sold or otherwise disposed of by the guardian, administrator or widow without the prior consent (tumello) of the paternal uncles and other relatives of the heir entitled by Basuto Law and Custom to be consulted (reriso).

(3) If the heir in any house is a minor, the principal heir (mojalefa ea ka sehlohong), if he is of age, is regarded as his guardian (moholisi). If the principal heir is himself a minor, the guardian appointed by the relatives (bang-ka-eena) for the principal heir shall also be the guardian of the minors in any other house. Such guardian must use the property allocated to any particular house for the maintenance of the heir, his brothers and minor sisters of such house only.

(4) Where property has been allocated (abetsoeng) to any particular house and the wife in that house predeceases her husband, the property allocated shall remain with that particular house to be inherited upon the death of the father by the eldest son of that house and to be shared by him in accordance with Basuto Law and Custom with his junior brothers in his own house.

Inheritance (Lefa)

13. (1) Subject to the provisions of paragraph 14 the heir in Basutoland shall inherit all the unallocated property of the estate (leruo lohle le siiloeng le sa ajoa) and he is obliged by custom to use the estate with his father's widow (ho sebelisa lefa leo le mohlolohali) or widows and to share with his junior brothers according to their rank, which shall be according to the order in which their mothers were married.

(2) The question of what portion of the unallocated estate shall be set aside for the support of the deceased's widow or widows during her life or their lives, shall be decided (reroa) by the paternal uncles of the principal heir and other persons whose right it is under Basuto Law and Custom to be consulted (reriso).

Allocation (kabo) of property during lifetime

14. (1) If a man during his lifetime allots (aba) his property amongst his various houses but does not distribute (arola) such property, or if he dies leaving written instructions regarding the allotment (kabo) on his death, his wishes must be carried out, provided the heir according to Basuto custom has not been deprived of the greater part (karolo e kholo) of his father's estate.

(2) A widow who has no male issue in her house shall have the use of all the property allocated (abela) to her house. On her death the principal heir shall inherit the remaining property but he must use the property for the maintenance of any dependants (baphelisuo) in such house; provided that no widow may dispose of any of the property without the prior consent (tumello) of her guardian (molisa).

(3) If there is male issue in any house other than the house from which the principal heir comes, the widow shall have the use of all the property allocated (abela) to her house and at her death any property remaining shall devolve upon the eldest son of her house who must share such property with his junior brothers in his house; provided that no widow may dispose of any property without consultation (therisano) with the guardian (molisa) while that son is a minor, and provided further that on the eldest son reaching majority he will assume control (o tla gala ho laola) of the property in his house.

(4) Any dispute amongst the deceased's family (bana ba mofu) over property or property rights shall be referred (for arbitration - namola) to the brothers (bana babo) of the deceased and other persons whose right it is under Basuto Law and Custom to be consulted (rerisoa). If no agreement is arrived at by such persons, or if either party wishes to contest their decision (khaola), the dispute shall be taken to the appropriate Court by the dissatisfied person.

Both extracts express or imply three basic principles of succession which are aptly summed up in some well-known Sesotho brocarths or legal maxims (5):

- (a) malapa ha a jane (houses do not eat each other up);
- (b) molao o tloha ntlo-kholo o ee ntloaneng (rights go from the senior house to the junior);
- (c) nts'o-salla o salle ba melato (the successor succeeds to the liabilities too);

(d) monna ha a shoele (a man never dies).

The customary law of succession could be described and analysed very largely in terms of these legal proverbs. The fact that they are not at all points fully consistent with one another only reinforces their importance and makes them the more appropriate, since it is at the points of collision, and within the interstices of their ambiguities, that the real essence of the law as a living institution in society is most faithfully expressed.

Commentators have encountered great difficulties in seeking to give a definitive account of the Sesotho law of succession (6). Some of these difficulties are real, but many of them are the product of the commentators themselves, who too often embark on an erroneous quest for substantive rules of universal applicability. As has been seen in the case of land allocation, there are legalities indeed, but these take the form of principles that are at once general and concrete, whose application and specification in particular cases depends upon a very wide range of facts, for the most part peculiar to each individual situation. The search for a fully deductive system is misplaced; it will be argued in the final chapter that this is always and especially true in a society where roles themselves are not fully "specified", and where as a consequence it is never quite possible to isolate matters of "relevancy" in such a way as to provide an armoury of rules enabling decisions to be arrived at, as it were "in advance" of the facts.

Furthermore, the application of a general rule to a particular case does not have the effect of specifying or narrowing the law in other "like" cases, since "likeness" is a function of what it is that is regarded as importing a relevant comparability, and this criterion is not available in Basutoland below a fairly high level of generality. Just as it has been argued that it is precisely where ts'imo hase lefa and monna ha a shoele are set on a collision course that the living reality of land law emerges, so also it is often exactly where the heir's rights and the widow's claims collide that the law of succession and inheritance proves itself as a servant of the living society that generates it (7). The revised provisions of the Laws of Lerotholi set out above represent a brave attempt by contemporary Basotho (and others) to "codify" and specify the "rules" which are taken to apply. It is fortunate -- and significant -- that this goal has not been achieved. For it is precisely at the points of greatest difficulty that sections 11-14 are either silent or ambiguous.

It would be no more than a venial exaggeration to claim that the only really valid, customary and "universal" rule in these sections is that contained in sec. 14 (4), where it is stated that any dispute over succession and inheritance must go before the lelapa (family) of the deceased. This is a traditional rule, and it is in the attempt to get back behind this crucial procedural requirement and to specify the substantive rules to be

applied that most of the recent explorations in this field have been mistaken. It would be going much too far, of course, to claim that there are no substantial "rules" of customary law at all; an attempt will be made below to ascertain and describe them; but they are, like nearly all customary "rules", not really "rules" at all, but norms, at once general and concrete, expressing principles that are held to activate and inspire the decisions in particular cases. In many respects, the current Laws of Lerotholi are a very respectable attempt to render these visible and articulate.

Before the four brocartes quoted above are individually and collectively discussed and referred to the passages from the 1873 Report and the 1959 "Declaration of Custom", some characteristic attitudes to the relevant legal concepts will be analysed as a way of setting the scene. One of the most important and illuminating of these attitudes is found in the context of "ownership" (8). Lawyers find it frustratingly difficult to match the categories in which common-law or civilian systems handle this concept to the categories employed by Basotho. In some senses, it is impossible to equate "ownership" to any Sesotho category. This does not, of course, mean that the Basotho have a permissive view of theft, or that they are in the smallest degree uncertain of when some item or right does not belong to an interloper who sets about claiming it. In quarrels over property of every kind, the Basotho are a supremely litigious society,

with an extremely highly wrought consciousness of rights and a lively resentment of any invasion of them. But within what in a particular matter is taken to be the primary affinal and/or agnatic group, the concept of ownership is not used to discriminate between the rights of different group members. In a case where a widow and an heir survived and it was a question of liability for bohali in respect of a younger son, I was told "The widow has the cattle, but they belong to the heir" (mohlolohali o na le likhomo, empa ke tsa mojalefa).

Commentators, more particularly lawyers, have exercised themselves fruitlessly in the search for a clear explication of just such statements. Of course, there is an important sense in which the property of a minimal agnatic lineage is a common asset of the group; but this does not so much dissolve as pose the problem, since bitter disputes occur within such groups over the distribution and allocation of divisible items. Moreover, the widow is not an agnate of the deceased, his brothers or his sons, and her position in relation to the houses (huts), cattle or other wealth of her late husband is contingent and non-heritable, yet it is above all in relation to her that the greatest complexities have arisen in determining the differential character of the rights of widows and heirs. From time to time the courts have tried to apply concepts of "usufruct" and "estate", but with inevitably limited success (9).

Another fundamental attitude characteristic of the Basotho, and linked again to the generality of customary norms, is the regular recourse to the requirement that disputants within the "family" must agree. This stipulation replaces the specification of any substantive arrangements which they must agree to -- and of course it is the latter which typically interest and concern the western lawyer in his approach to these problems; to him, it is precisely when disputants do not "agree" that the law becomes manifest; whereas for the Basotho, such a breakdown within the family represents a situation not where the law is at last made clearly visible but rather one where it is most distorted and obscured. It is certainly the case that when this happens the disputants will fight their case with the greatest passion and tenacity, but it is an error to suppose that this is therefore the point where "law" has emerged from "private agreement". The law, in the ideal case, defines certain parameters within which the anticipated agreement operates, and provides a battery of often inconsistent and sometimes directly opposed legal weapons, to furnish the various interests with a broad legitimation of their general position and claims. To that very significant extent, social relationships in matters of inheritance are "law-governed" as they are, in principle, in other fields too. The Basotho, as has been noted, are not only litigious, they are lawyers, even legalists. They are all the more able to be so, by virtue of the very ambiguities of the law,

which enable a variety of different claims to be advanced and different outcomes to be justified, on the basis of an overarching "law" to which all assent.

Both the Laws of Lerotholi as cited above, and the traditional language of the Basotho in court and out of it, make frequent use of expressions translated by such words as "work with", "use the estate with", etc. The word "with" is, in fact, an accurate translation of the Sesotho le, and conveys just the indeterminacy which pervades the norms of customary law -- e.g., in 13 (1), where the heir is obliged by custom to "use the estate with his father's widow" (ho sebelisa lefa leo le mohlolohali). Such "laws" are, in fact, not to be seen as the stipulations of a code that is invoked after the breakdown of "family" consultations -- if they were that, they would be meaningless -- but rather as the norms which are expected to be expressed in such private gatherings, and to determine the contours of the emergent settlement.

Traditionally, of course, if recourse were had to a court at all, it would be to the undifferentiated lekhotla of the chief, where what are now distinguished as judicial matters (litaba tsa kahlolo) and administrative matters (litaba tsa puso) were not segregated. The modern judicial court finds itself in a difficulty, since it conceives its function to be that of determining existing rights, whereas it is exactly because no rights have been created that the deceased's relatives have come to court

at all: hence the anxiety of judges and magistrates to ascertain specific rules enabling them to declare rights abstractly and universalistically deducible from the law. The view point of the chiefs' courts was quite different, and is aptly expressed in the words used by a court president in a case that occurred before these courts were overwhelmed by modern legislation:

"I am proud that this case has reached me, as I am the distributor of estates (moabi oa mafa). I am awarding these things in accordance with the law. If your father had died without giving this horse away, I would have divided it in two parts and each of you would have had his share" (10).

In another case, the Paramount Chief's Court gave precise instructions to a husband to restore to the house of the principal wife "the saw, saddle, hammer, battle-axe and a copy of the judgement". It went on to threaten that if these instructions were not obeyed, the husband's land would be allocated to the wife (11).

Such disputes are, in fact, brought still to the chiefs' courts, either instead of or as a preliminary to the judicial courts (12), where matters can be conducted without the distractions of "judiciality" (13). The chiefs' courts, in fact, act -- or attempt to act -- where family councils fail, or where (as in the Rantsilonyane case described in the previous footnote) there is no basis for consensus. New rights flow from the decisions (likhaolo) of such courts, much as they flow from a council of the lelapa. As will be argued in the concluding chapter, it is wrong to regard this

situation as one where the (specific and determining) "law" sets a framework for the operation of "discretion" where legal rules do not operate. The likhaolo of the chiefs' courts flow from the law and are shaped by the general norms that characterise it.

II

It is against this whole background that the ensuing discussion of particular matters and purported "rules" is to be understood.

The brocart stating that malapa (matla) ha a jane means, literally, that "houses do not eat each other" (14). Subject to certain important reservations, especially with regard to the special position of the first house and, within that, of the senior son, the "houses" of a polygamist (15) are separate and mutually protected entities, each with its own limited autonomy and each endowed with its own estate. The points of interest that arise concern (a) what constitutes a "house", and who are members of it and (b) what kind and degree of autonomy the houses possess, and what acts or behaviour amount to "eating up".

In the most direct sense, of course, a house is constituted by one of the wives of a polygamist together with the issue of that wife. Complications enter because of two principal factors -- the introduction of "secondary" wives, and the practice of adoption. It has already been observed that where a wife is barren,

and dies without issue, her father (or his successors) are expected to provide another daughter as a substitute. The amount of bohali is reduced in such a case. As was observed in Chapter Two, the requirement that the original wife should have had no issue is probably not absolute (16). This seantlo (17) enters the house of the wife whom she replaces (18), and her children are sons and daughters in that house. But seantlo in this strict sense is only one form of secondary union. If any of a man's wives dies, he may marry another wife (not a sister of the deceased) into the same house, and her children will be children of that house ('Mota, J.C. 176/57). Where a wife is barren, or even where she is not, a junior wife (ngoetsi, also meaning daughter-in-law) can be married into an existing house and bear issue in it. Kenelo, which has been discussed in Chapter Two in relation to the succession to Lerotholi, also introduces issue to a house, though in this case it is the genitor who is replaced, rather than the wife. Marriage to the grave (ho nyalla lebitla) is another (now officially discontinued: Laws of Lerotholi (1959) II 34 (3)) form of providing issue to a barren house. Janefeke had no issue in his first three houses, but only a son (now deceased) in his fourth. He therefore married a girl to the still-born son of his first house and arranged for Tau, the son of his brother, to cohabit with her (19). Woman marriage is another expedient for filling or reviving a house, though it is very much open to doubt

how successful a claim based on this alone would prove to be -- or has ever been (20).

A further complexity arises from the payment of bohali. First, it does not necessarily follow that an illegitimate child is legitimated by the subsequent payment of bohali for his or her mother (Mahamo v. Ramohele J.C. 197/64, Basotho Courts' judgments). Normally, extra bohali are paid, or there should be some other form of indicating that the legitimation of previous issue is intended (cf. Duncan 1960: 30). But it is not always easy to determine questions of bohali; in the first place, though the number of cattle is theoretically twenty (or more in the case of major chiefs), a smaller amount is adequate if agreed to (21); in the second place, bohali is not necessarily, or even usually, all paid at once, so that it is hard to determine which beasts are the "extra" supplied for a child; and in the third place, special arrangements can be made for particular purposes, whereby the payment of bohali can be partly concealed (22).

Secondly, it can be relevant who it was that "took out" the cattle (from his kraal) to provide bohali for the groom, or (more commonly) to legitimise a child. Thus, where a second son paid ten cattle to legitimise the offspring of a union between his younger brother and a girl, the child so legitimised was the heir of the second house, instead of the elder brother (eldest son) (Monne J.C. 91/49; 125/51), since ngoana o tsoaloe

khomo, "the child is begotten by cattle". (See also Lejaha J.C. 91/59).

It will be apparent that the question of who constitutes a house is thus open to a wide range of doubts, both of "fact" and of "law", especially when (as so often) the event cited took place some time ago, and where only a tiny fragment of evidence may suffice to tilt the balance one way or the other (23). Adoption introduces a further complication again. What is at issue here is not, in the normal case, the adoption of a stranger, but rather the removal of a person from one house and his translation to another. This regularly happens in the case of imbecility or insanity, or where there are several sons in one house and only daughters in a house senior to it. As was seen in Chapter Two, much of the trouble in the house of Molapo was due to the (imbecile) Joseph being put in the charge of Joel from the junior house, even though there was no adoption or translation. An issue of "private" succession, however, arose in the case of Matjeketjeke's sons. Sekhukhuni, his son in his first house, showed signs of imbecility, so he translated Ketseletso, the eldest son of his second house, to the first. But the Paramount Chief's Court decided that Ketseletso's heir could not oust the son of Sekhukhuni (Mokhesi J.C. 230/45). But where a senior son, Mosoeu, had no male issue, the son of the third house adopted into it (ngoana ea holet-seng ha Mosoeu) was heir in precedence over the second

house (so Mohaleroe in Sefali J.C. 1/64, only the adoption was not proved). When a man adopts an orphan into an existing house, he determines the order of succession, putting his own heir or the senior son of the house first.

More than one of these various sources of dispute is illustrated in the case raised by Joel Mots'oene against Letsie Mots'oene, Principal Chief of Leribe (now deceased). Joel argued (Mots'oene 1954 H.C.T.L.R.1) that his father was the eldest son of the former chief Mots'oene by the latter's fifth wife, Selahlelo, whereas Letsie's father, Koabeng, was the son of the seventh house. Letsie argued, against this, that Selahlelo had never been married to Mots'oene. She was the wife of Sekake, to whom she had born three children, and after his death she went to live briefly with Mots'oene to whom she bore a son. But since she had not restored the cattle of her marriage to her late groom's family, she had never been divorced from him (24). Joel argued against Letsie that since Selahlelo's children had been left with Sekake's people, no restoration of bohali was required; moreover, Mots'oene had paid bohali of twenty cattle to Selahlelo's father, as bride-wealth for the marriage. Letsie denied that these cattle were bridewealth, and argued that they had simply been paid so that the boy, Makakamela, should stay with Mots'oene as a junior son. Moreover, Letsie claimed that his father Koabeng was the eldest son of the third

house of Mots'oene and thus in any reckoning senior to Makakamela (25).

If the order of houses is agreed, or decided by the lelapa or a court, then the law is that the inheritance passes from the senior house to the junior, if there is no heir in the senior. This is the meaning of the brocart, molao o tloha ntlo-kholo o ee ntloaneng. Property remains within the minimal agnatic lineage, descending (in the absence of a son) to the next junior brother of the deceased. Only if there is no such will it "rise" and be distributed in terms of the next inclusive lineage segment. But if a younger brother dies with no issue then (leaving aside the question of any widows he might leave) the estate passes to the principal heir (in the senior house). The brocart does not strike at the position of the principal heir, who remains the head of the minimal lineage of the deceased and is the residuary beneficiary. Its purpose is rather to send an inheritance "down" from him to the junior house in the event of his death without issue instead of allowing it to pass up to a brother of the deceased. If the latter happened (other than when there was no other person to "eat" the estate), then this would mean that one house (in the previous generation) was "eating up" another, contrary to the interdiction on ho jana. It would also be logically contrary to the movement of succession in a forward direction, and this movement is seen as essential to a properly working

system, since it is only if it passes to younger men that a consistent principle can operate; if it went "backwards", either there would be no one alive to succeed, or it would pass, in a way seen as indefensible, to the scions of remote houses. This approach was stressed by the Paramount Chief's court in Shoaepane v. Maama J.C. 92/58. The principal heir's position within what might be called the "successor group" -- the sons of the deceased -- is thus not diminished but rather strengthened by the rule of ho ea ntloaneng.

III

Paramount Chief Seeiso divided the bulk of his cattle between his first three houses (those of 'Mantsebo, 'Mabereng and 'Maleshoboro). On his death, 'Mantsebo retained the cattle for her lifetime, after which they passed to Paramount Chief Bereng (Moshoeshoe II), in the second house (he had failed to remove them from 'Mantsebo in 1960). George Moshoeshoe in the 1873 Report states (p.45) that "a widow can inherit cattle belonging to her house if she has no male children at the death of her husband", and this might be thought to support an argument that she could dispose of them as she pleased. But such an assumption would be unwarranted. In the case in question, Ntsebo (the Chieftainess's daughter) was already married, but it does not follow that had she not been her mother could

have given the cattle to her. This would be to mistake the position of women, at least in the older society, though recent practice (and this means indigenously derived practice) has undoubtedly greatly modified the status and capacities of women in Basutoland. Nevertheless, the argument figured above, in reliance on George's statement, remains open to doubt. If, for the sake of analysis, it is assumed that a widow is left with no issue in her house, then George's opinion that she can "inherit any cattle belonging to her house" appears either illogical or superfluous, since "her house" consists simply of herself, and if they "belong" to that house, she does not need to "inherit" them. This goes to show the caution with which formulations like this need to be approached, and underlines the warnings expressed above about the attribution of rights in rem to individuals -- especially to women, and more especially to widows in polygamous families. "Belonging" as used here refers to the allocation (kabo) of cattle to a house by the husband or other entitled person. At the time of the allocation, it is not normally known what issue will come to that house. Once the allocation has been made, the husband is obliged to "use" that allocated estate "for" the house in question, and this obligation survives him and passes to his heirs. The widow is thus a main beneficiary of the allocation and is protected in her enjoyment of the style of life made possible by it for the rest of her

life (26). It is in this sense that she "inherits" the property "belonging to her house".

It is true that George distinguishes between the case where a widow has a son, and one where she does not, and the question arises whether this does not therefore give a special meaning to his statement that in the absence of male issue the widow "inherits" the cattle, since where there is male issue he qualifies the son's "inheriting" by saying that he is only "acting for his mother, who has charge... during her lifetime... but at her death, then it devolves upon" the heir of the house. Since, it is argued, the widow in a qualified sense "inherits" the use of the cattle where there is a son, then where there is no son, her "inheritance" must be unqualified, giving her the right of disposal. The argument is plausible, but unsound. Where there is a son, George first states that he "inherits", and then proceeds to qualify the rights which this gives to him to a point which seems to restore the effective control to the widow. Where there is no son, the matter cannot be expressed in this way, and the widow is therefore said to "inherit". But it is quite certain that in George's time widows (in common with though to a lesser extent than women in general) were obliged to act always and only "with" the male agnates of the deceased, and though their obligation to do so is probably much less strictly defined today, the core of the doctrine remains: the

agnatic family cannot be deprived of its wealth (leruo) by the unilateral act of a widow, who (after all) remains a member of her husband's family and "married" to them even after his death. It is, moreover, common for a husband to allocate much of his estate to the senior house, and where (as with Seeiso) this house has no male heir, it would be the consequence of the argument here assailed that this substantial portion would be removed from the agnates -- a conclusion whose absurdity is, in Sotho terms, self-evident.

A great amount of debate has gone on, in court and out of it, as to the relative position of the widow and the heir. The above account, though based on the continuing argument, represents the writer's analysis of the position, and to a considerable extent departs from the indigenous conceptualisations both of the Basotho and of the Roman-Dutch courts. Basotho, and the Basotho courts, talk in terms of heirship, and frequently disagree with each other. At times, these disagreements concern the status of women, some adhering to the more restrictive features of the older law and regarding the de facto changes as foreign to Sesotho custom, others affirming that though there have been changes, these are either less radical than is claimed (since the old law was not in fact as restrictive as the others assert), or that such modifications are legitimate changes in custom, not abrogations of it (27). But, for much of the time, the disagreements are largely

terminological and neither represent nor lead to any substantive difference in outcome. In Makafane's case, the Basotho court stated that "under the customs of the Basotho the widow cannot become an heir" (Hololo Central, C.C. 63/61, cf. J.C. 100/64). At Likoeneng (C.C. 49/63, Qatha v. Nte J.C. 55/64), the Basotho court stated that the estate of the deceased Brakafese was "still in the hands of the widow"; and at Salang, it stated that the widow, not the son, was heir (Kente v. Foloko J.C. 212/63). Such seeming contradictions could be multiplied. But it is the argument of the present analysis that these do not represent, for the most part, substantive disagreements at all. Whether the widow or the son is called the "heir" depends on whose rights appear to be under invasion. In Mafakane above, the purpose of the decision was to make sure that the widow did not alienate her late husband's estate in her house without consulting the deceased's agnates, so that it could be determined from which part of the estate the debt claimed was due. In Qatha above, the son appeared to think that his late father's creditor was suing him for the estate, as though disputing the "lefa" itself. The court pointed out that the suit was for a debt (the return of goats and progeny lent to the deceased); the son in stating that he was only the molisa (guardian) of his mother, who held the goats, failed to realise that it was precisely as guardian that he was liable, and that Nte had properly sued him as the

successor of the late Brakafese. The puzzlement arises from the fact that there is in fact a kind of guardianship within guardianship. The widow is not, as had been shown and is in any case universally admitted where there is a son, the "owner" of the estate in the Roman-Dutch or commonlaw sense, but only holds it "for" the house. Yet the son, at least if married, is regularly his mother's guardian too. He looks after the cattle "for" his mother, who in turn is looking after them "for" him. The purpose of the system is to secure proper support for the widow, and at the same time to protect the property of the house, for the benefit of the heir. During the joint lives of widow and son, that person can be said to have the right to "eat the estate" whose position in the particular case appears to need protection and support. Equally, it may be necessary to deny the name of mojalefa to a person who is using his or her rights to the property in a way that causes detriment to the other (28).

The "indigenous conceptualisations" of the Roman-Dutch courts are to be more impatiently rejected. They depend upon a determination to identify a single unambiguous titular of the rights in rem to property, and result in a false dichotomisation between an "heir" and a "usufructuary", or between an "owner" and a "tenant for life" (29).

IV

Not all the estate is normally allocated to the houses of a polygamist. That which is left unallocated at death passes to the principal heir, viz., the eldest son in the senior house with male issue. This unallocated estate is not earmarked to the widow of the principal heir's house but falls directly to him, provided he is of age (i.e., in traditional law, married). A problem that arises concerns what is to happen when the deceased had only one house. Is all the property to be regarded as allocated to that house? Or is it all unallocated property, which passes directly to the heir? An immense amount of judicial and juristic energy has been brought to bear on this issue. It is argued that if all the property is allocated, the heir to a monogamous marriage is worse off than the heir to polygamy, since all the estate is earmarked to the widow. It is also argued, against this, that if all such property is regarded as unallocated, the widow's position is very weak since she is left with nothing (30). It will be apparent that in terms of the present discussion, both these arguments, and others couched in similar form, must be treated with some scepticism, since they are based on questionable assumptions as to what the debate should be about, and turn largely on the desire to locate the holder or holders of rights in rem to the estate. If the terms of the discussion are transposed in such a way as to be directed to the

protection of the rights (litokelo) of the various persons involved (the widow and the issue, among whom primarily the heir) then much of the debate becomes irrelevant. The superior Roman-Dutch courts are reluctant to see the issue in this way, since the way in which modern courts handle interpersonal issues is, so far as possible, by attributing predetermined and if possible real or at least specific rights to the parties. The Basotho courts kept close to the relevant concerns in *Ralienyane v. Lekaota* (see note 30), one declaring that it was a case for the family council, and the other (recognising perhaps that matters had passed beyond that point) finding for the son but upholding the right of the widow to be supported by him from the estate (31).

It is not inevitable that the husband should make an allocation during his lifetime, but if he does so, he must stand by it and use the allocated parts "for" the houses to which they "belong". But he must not allocate it in such a way as to deprive the principal heir of more than half the estate (32). This offers the heir some protection in his vulnerable position as universal successor, discussed below. Where there is no male issue, the property still attaches to the house until the widow's death, when it falls to the principal heir. Where there is male issue, the property of course remains with him after the widow's death (33).

If the estate has not been allocated at all, the unallocated entire estate falls to the principal heir; but as Laws of Lerotholi sec. 13 makes clear, this does not acquit the heir of his obligations towards the other houses; rather, it places on him (subject as always in this area to the family decision) the duty which his father has left behind when he died. Although the Laws of Lerotholi do not use the word "allocate", this is what is involved (sec. 13 (2) speaks of a portion "set aside", beoa kathoko). The principal heir for many purposes steps into his father's shoes -- he is, in fact, a successor, and his position needs rather more careful and concrete scrutiny than the discussion so far has provided. But before specific cases are considered, some preliminary attention must be paid to the general nature of the heir's status as successor, a status which is expressed in the third and fourth brocards set out previously, and especially in the maxim nts'o-salla o salle ba melato. In Matsosa J.C. 151/55, the judge in the Basotho Court at Matsieng (A.C.I., C.C. 190/55) quoted the maxim and commented that it means that "the heir... will make good his late father's debts, regardless of how much estate he has left behind". The court at Lejone came to an identical conclusion in Motsiri v. Lintlhonoane J.C. 79/65, and a similar interpretation is directly implied in Brakafese's case discussed above (Qatha v. Nte J.C. 55/64), where Qatha was liable for his father's debts,

even though the estate was in the hands of the widow. The saying that monna ha a shoele, "a man does not die", reinforces this: there is always a successor (34). The obligations of succession apply not only to debts owed "outside the family", but also, as has been said, to arrangements inside the family of the deceased. It is now necessary to see what may be involved in this. Real life situations are less unambiguous than the Laws of Lerotholi suggest, and it has of course been argued above that (quite apart from the exogenous character that marks certain aspects of these "laws") the norms of customary law are not to be taken as rules governing every future eventuality. Thus, the Laws as given do not disclose the possibility, and the consequences of the possibility, that the estate may have been allocated in such a way as to leave the junior houses well provided for, or that it may have left them with very little. What happens is that each case is looked at in the light of the customary norms of fairness between houses and obligations of support, and a decision made that flows from this consideration of the matter. Thus, David T.'s father died leaving a large number of beasts, which may be put at 250 as a round figure. Before his death, he allocated fifty to his second house and twenty-five to his third. He did not formally allocate any to his senior house. The 175 unallocated cattle stayed with the widow, and the heir lived with her. He looked after

his mother and the cattle too. The two younger brothers also stayed in the same place and the cattle were all used together, though they took their cattle out when they left to go to their own place on marriage. (Such allocations in fact take place between brothers in one house, though the law as so far discussed only contemplate allocation between houses). If the heir leaves his mother's home, she should release some cattle to him -- and, of course, they will all come to him on her death -- especially where the heir had no cattle of his "own", unallocated by his late father. Disputes would traditionally go before the "family" and then on to the chief's lekhotla if no settlement could be reached. Normally, where a reasonable part of the estate has been allocated to junior houses by the deceased, the principal heir is not obliged to support these houses (e.g., by providing bohali for sons being married) out of the unallocated estate. If the heir himself discharges the duty of allocating a (wholly or largely) unallocated estate, he will take such debts into account in deciding how much support he can afford to let the junior houses have, as well as other factors such as the number of dependants to be supported in each house. And the heir is, of course, liable to look after his younger brothers in the junior houses. It is further his responsibility (as with all eldest sons) to support his own mother, no matter whether a part of the estate has been allocated or not (35).

These considerations raise the question of the relationship between houses, and recall the maxim partly discussed at the outset, that malapa ha a jane, "houses do not eat each other up". What falls now to be examined is the question of what kind of action or disposal actually constitutes such "eating up". Basically, what is forbidden is the use of the property of one house for the benefit of another, and the problem arises most frequently at a point where the houses have not yet emerged into full independence: where the heir of one or more of the houses is a minor, and the widow either dead or under the guardianship of the principal heir or of another agnate (usually brother) of the deceased. It is for example contrary to the maxim to take cattle from one house to provide bohali for the son of another, and it is equally wrong to take bohali paid in respect of a daughter of one house and put it into another. The position here is, however, complicated by the fact that if a man helps a junior with bohali, he can receive a portion of the bohali paid for that brother's sister: and a fruitful cause of dissention is whether such a transfer is the repayment of a debt, or the improper "eating up" of a house. Where the estates are "mixed up", for example where cattle are kraaled together, there is moreover no visible or physical separation of the houses. When quarrels supervene on a previously amicable arrangement, questions of house-property arise that are hard to sort out since the

original facts have passed away or never been ascertained. It is largely for this reason that the houses of a deceased often physically separate out after the death, and most independent homesteads have their own kraals. Half-brothers, and brothers too, seek their own sites because of the need to identify their own property. This is more true in the larger villages than it is in smaller homestead-type settlements, where the headman is in fact the head of the extended family and can make a more immediate determination of rights. Thus, at Temeki's village under Masite mountain, all the inhabitants are members of one extended family, under their own (ungazetted) headman Nkopara, and they all kraal their cattle together. No one seemed to think that this arrangement would work in the immediately neighbouring village of Masite Nek. This is not just because the village is not "one family". The relatively coherent and long-established Moeno lineage uses seven different kraals between its six minor segments. It is, of course, the obverse face of coherence that there should also be disputes, since quarrels arise precisely between those who live close enough to have occasion for disagreement; and the Moeno people are constantly quarrelling. The separation of cattle is partly a consequence of past quarrels, partly a recognised means of reducing future ones. (The dispute current during the research concerned not cattle but sites and lands; see Chapter Four, and the case of Moeno J.C. 214/64). But this

physical separation will often not occur during the lifetime of the father, so that on his decease it becomes a question of recalling the details of his allocation.

As with all such acts in the law, allocation requires publicity, and should not only be performed "with" and in the presence of the heir and other agnates, but also reported to the chief. Nevertheless, questions of fact become matters of dispute when years have passed -- and when, as often enough, the original witnesses are absent or dead.

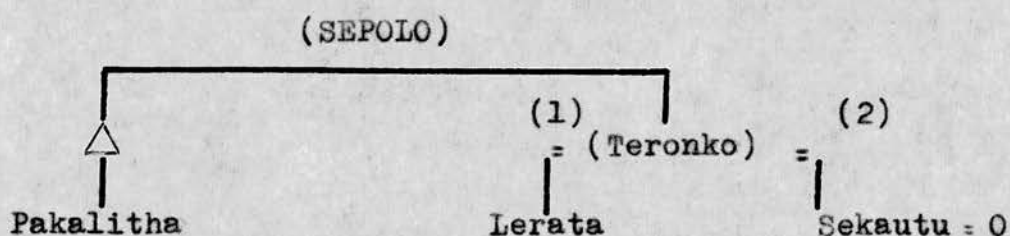
It is worth repeating that the maxim malapa ha a jane applies equally to the father during his life as to the heir after his death. The allocation to houses means, for instance, that bohali cattle must be taken either from the kraal of the groom's house or from that of the unallocated estate retained directly in the husband's hands. On his death, the maxim protects the house-property of the heir as well as that of junior houses. But it does not protect the unallocated estate, nor does it free the heir from his personal liability to discharge his father's debts, which he may have to do out of his own labour and wealth if the estate is not large enough to bear the charge. Though the maxim nts'o salla is in tension with the maxim malapa, the two should not conflict. The aspect of the law which a disputant stresses will, nevertheless, tend to reflect his view of his own interests. In *Mangana v. Tlali* J.C. 50/60, Albinas claimed from 'Ma-Phiri (a woman) two goats which

had admittedly been borrowed from him some years before. 'Ma)Phiri was the widow of Sehloho, from his father's senior house, and she replied by arguing that the goats had not been borrowed by her, but by her late husband's son, Moela, from a junior house. The debt therefore bound the house of 'Ma-Moela, and 'Ma-Phiri was not involved. This defence was accepted by the court at Maja's, but the Paramount Chief's court at Matsieng differed: "According to law, 'Ma-Phiri may not be forced to pay this debt with the property of her own house, but it is not for Albinas to say which house it is whose property must satisfy the debt. It is for 'Ma-Phiri to determine the family property that must settle the liability". It is clear from this that although the heir (in this case, the heir's widow) is liable, this does not rule out his own recourse (in turn) to another source. This is shown (though malapa are not involved) in the case of Matsosa already mentioned above (J.C. 151/55), where a closer look at Lerotholi's judgment illuminates this point. It will be recalled that the heir was held liable for his father's debt, even though the estate is small. In this case, the elder son argued that his younger brother should pay the balance of his own bohali. The court affirmed that the heir was liable, and quoted nts'o salla, pointing out that the elder should have taken the matter to a family council first. The liability of the heir, while not permitting him to breach the rule of "eating up", does

not mean that he has no recourse to persons substantively liable (36). Chieftainess 'Mamathe of Masupha's was involved in a dispute that raised this question (Masupha v. Rapopo J.C. 22/64). The plaintiff's case rested on the concept of nts'o salla, the chieftainess's defence on that of ho se jane (not eating each other up). The case was brought by Zulu Rapopo, who claimed bohali for his daughter, who was married by Liketso, heir to a junior house of Masupha I. The court at Motjoka decided in favour of the chieftainess (Zulu later complained that the judge was her "brother", viz., parallel cousin) on the ground that "it is not all the sons of Masupha for whose bohali the defendant (moarabeli) is answerable". The chieftainess was properly sued, as head (regentess) of the house of Masupha, but she was not obliged to take out cattle from her own kraal. The bohali still owing must come from the house to which Liketso belonged. This case involved "houses" related at a considerable lineage depth ('Mamathe's late husband, Gabashane, was the great-grandson of Masupha I), so that reference to "unallocated" estate would be inappropriate. The issues of succession on the one hand and house autonomy on the other were thus squarely posed. The only complication that entered was that there was some evidence that the late Gabashane, during his life, had tendered some bohali for the junior (and in fact illegitimate) grandson of his grandfather. 'Ma-Mathe denied this, and she may have been right, but at all events it

would have been an entirely normal act for the senior chief of a cardinal house to undertake. Zulu's tactic was to represent this gift -- if it happened -- as an obligation that fell on Gabashane's widow as his successor-regent.

Another case in which seniority in succession founded an argument that ran counter to the ho se jane rule was that of Mojake v. Litjamela J.C. 4/63. Here, Lerata argued that bohali for his junior half-brother (Sekautu) was due not from himself but from Pakalitha, the heir of the senior branch of his grandfather's lineage. It was, in this instance, in the interests of the disputant to stress the line of succession superior to his own, and try to settle the liabilities away from his own house. He did not, of course, pursue the logic of this to the minimal lineage of which he was head (here, it was of course in his interest to recall the autonomy of the houses).



Mojake v. Litjamela

Disputes such as these (37) are a further illustration of how the norms of customary law, since they are maintained at a high level of generality, can sometimes

more and sometimes less plausibly come into real or apparent conflict, parties stressing the one rather than the other according to their perceptions of their interests. In the more plausible cases, the Basotho courts will normally look to the question of who is being invaded, who is threatened with "eating up"; the maxims enable the decision to be based on reasons, but it does not follow that that decision is constrained (38). In less plausible cases, Basotho litigants cheerfully acknowledge that they were simply "trying it on", and giving their adversary a run for his money.

V

The "Family Council"

The council of the lelapa referred to in Laws of Lerotholi 14 (2) consists essentially of the brothers (bana babo) of the deceased. Its exact composition, however, depends on the interplay of several other factors, such as the status of the "family" involved and the importance of the matter of succession and inheritance to be debated, the social and geographical proximity of the various individuals who fall within the categories of person who may attend the meetings, the history of individual and group relationships within the wider lineage, and even the personal predilections and preferences of influential members of the inner agnatic group.

The usual reference is to the "paternal uncles" of the heir. The most important decisions obviously have

to be made when the head of a senior segment dies, and since by definition all his brothers are in that event junior to him, the paternal uncles are often called bo-rangoane of the heir, rangoane being the junior brother of EGO's father (bo- is the plural prefix for this class of noun). But an elder brother is entitled a fortiori (ntate moholo, the same term being applied to a paternal or maternal grandfather). Brothers, of course, include parallel cousins (in this context, patrilateral parallel cousins), and the lineage depth in terms of which these are defined depends on some or all of the factors that have been mentioned. It has been seen in Chapter Two that in the case of the Paramountcy, it has now been settled that this definition is co-terminous with the national character of the office (39). The dispute over the chieftainship of Patlong, fully discussed and analysed in Appendix II, is an intermediate case, being less extensive in its implications than matters of succession to the higher chieftainships but much more "important" than succession within "private" or commoner lineages. The population composing the family council here was loosely defined to include many, but not all, of the representatives of lineage segments at a depth of four generations. In such cases, there is occasion for dispute over what is to determine seniority: whether this is to be "circumspectively" defined, giving special weight to the immediate agnates of the deceased, or "retrospectively", when the heads of collateral segments

will rank higher than the junior members of the deceased's family; in fact, the outcome will usually be "mixed", but the proportions of each component are a matter which cannot be deductively or predictively determined.

Seniority is important, since the decision depends not simply on counting heads, but more centrally on the views of the senior members of the assembly. Age itself is a relevant factor here, too, length of years constituting one element in seniority (see the role played by Kali Makoa in the Patlong dispute).

Balanced with these considerations are practical matters such as geographical proximity or the existence of some special constraint such as illness, old age or poverty that might make it difficult for a person otherwise wanted and welcome to manage to attend; in such a case, however, if a suitable representative could be found, he (if also a member of the deceased's lineage) would often come in his principal's place. Where much property is involved, it is important that all transactions, allocations and decisions should be witnessed by as large a proportion of the agnatic group as possible. Where there is little inheritable wealth, or few dependants, or only light obligations, publicity is less essential. Indeed, it is particularly where much is at issue that the more distant agnates (in either a geographical or a genealogical sense) are themselves most concerned to have a voice in the decisions that are made.

Again, an important factor in determining the

catchment is the character of the relationships between the lineage segments, which again depends at least in part upon their physical and social proximity. Where brothers have stayed together for generations (as with the Moeno's of Masite Nek) all who live in the cluster of associated homesteads will be members of the council. Where (as again with the Moeno's) one brother has moved away from the others, his presence or absence will depend on the degree of his proximity, the seriousness of his disagreements with his agnates, and the extent to which his interest in the matter is seen to be that of a potential contributor or rather that of a forisfamiliar son who is only anxious to take what he can before severing his links entirely. (Inheritances, of course, are potential occasions for disputes between agnates as much as they are matters for joint decision and cooperation). By contrast, where the major lineage is geographically dispersed and there is insufficient community of interest in property to bring its segments together, the composition of the family council will be organised more tightly around the immediate agnates.

These extra-structural factors weigh much more heavily where non-agnates are involved. The malome/mother's brother of the deceased may have a voice in the family deliberations, provided that he has seen a "true malome" and not someone who simply falls into the category of mother's brother. To be a true malome is to take a personal interest in his nephew (mochana), help-

ing him with his bohali and looking after his sisters. To be a malome in the relevant sense is as much an achieved as an ascribed role; and among the many bo-malome that a man may have, only a few will normally be brought within the intimacy of the family. Again, the malome will not as a rule have a voice in matters of public succession or participate in decisions that are internal to the agnatic family, or involving disputes between the agnates inter se. If the mother of the deceased is still alive, he will be concerned that she (his sister) is properly considered in the dispositions made after her son's death (40).

The malome of the heir also has a place, in his capacity as an agnate of the deceased's widow or widows. Again, the widow's agnates are concerned more with those dispositions that effect their sister than with other matters, and outside parallel cousin marriage would not have a voice in decisions that were internal to the agnatic lineage of the deceased. But where a "family council" met during the life of its senior member, the "true malome" would have an important role, especially where decisions affecting his nieces and nephews were involved. (41)

The adult sons of the deceased, and especially the heir, take a full part in the assembly, and in many matters of allocation and distribution the role of the principal heir (provided he is a major) is the most important of all. The wives of senior brothers and

elder sons are also entitled to attend, though here as elsewhere the position and status of women must still be regarded as in a condition of change, so that it is difficult to propose any general rule determining the part that they are expected or permitted to play.

Viduity itself confers rank and a degree of autonomy, so that (other things being equal) a woman's role will be the more influential if she is a widow, if among widows she is senior, and if her husband had enjoyed high rank among his own agnates. But here again non-structural factors enter, notably her seniority in years, the personal respect in which she is held, and the wealth or status of her own agnatic family.

The council of the lelapa thus consists of an indeterminate group of agnates and affines built round a core of "brothers" of the deceased. It is not possible to specify a general rule defining its composition with greater particularity.

CHAPTER SEVEN

CONCLUSION: POLITICAL, ADMINISTRATIVE
AND EXECUTIVE

M.G. Smith offers a framework for the analysis of government of impressive theoretical value (Smith 1960: chapter 2). He regards "the essential components of the structure and process of government" as being "political" and "administrative" activities; though these two components are found in a whole range of empirical relationships and associations the one with the other, they are analytically distinct, political activities being characterised by "power", administrative activities by "authority". The focus of political activities lies in the selection of policy and is marked -- and defined -- by contraposition. Administrative activity consists of authorised processes and lacks contraposition at any level, being an "inherently hierarchic" type of organisation. Empirically, the two components are not found in ideal form, yet the analytical categories can be employed to describe and classify the actual systems of government that exist in the field. Smith notes that no set of administrative rules could cover every possible situation or lay down in advance the precise action that an administrative officer should take. In so far as the administrative component is thus free, and indeed obliged, to take decisions, it exercises political powers. Further, although in such cases the administration is

operating within a framework of authority and exercising only derived or delegated rights, its decisions are regarded by subordinates as acts of power, as indeed they are, though circumscribed by the enabling provision. It must be added that empirically no code, as Smith notes, can of itself secure obedience and no system of supervision can wholly exclude ultra vires action by administrative organs or personnel. In so far as the administration is able to exceed its authority, therefore, it displays in still clearer form an exercise of power and a usurpation of political activity.

Smith's analysis does not deal explicitly with the place of law in political or government systems. In a brief reference he places it among the administrative activities of government, as standing apart from the executive or political spheres; it does not therefore, appear to involve the taking of policy decisions or the exercise of power. This corresponds to the view that the English legal system has traditionally taken of itself: its function is essentially declaratory rather than creative. No matter what hesitation, debate and uncertainty precede judgment, no matter how many inferior judgments are overturned on appeal, the Court tends to regard itself not as making but as declaring law, the law itself being conceived as existing, disembodied, in some noumenal realm of pure essence, from which it realises itself with ever greater particularity and sharpness of definition as it moves from potency to act

in the mouths of judges. Judges "find the law", they do not make it. They declare that the law governing a particular circumstance "is" so-and-so, as though even if they had, per impossibile, stated otherwise, it would still have been so. Even where a judgment incorporates an award of a particular sum of money in damages, this is still an act not of power but of authority; it is the ultimate self-realisation of the law, which here reaches a particularity that briefly reveals its features before it returns to the realm where only its hinder parts are seen: where the law never is, but always is to be.

Such a view represents the ultima ratio of authority, and the total disappearance of power. It supposes a code -- the "ideal law" -- wherein every possible configuration of acts and events is provided for and where every pronouncement of the administrative officer, whilst it may appear at the level of phenomena as a "decision" and is regularly so described, is really in essence an act of pure obedience: not, of course, to an identifiable human superior, but to the law itself. Even where the Court is applying the enacted law of a legislature or other sovereign, this obedience is not, strictly speaking, given to a determinate superior. The English and Scottish Courts do not inquire into what that sovereign intended to enact but into what it did enact; the object of obedience remains the Law, and not the person or institution that made the law.

But it is no accident that, to the lawyer at least, the quintessence of law does not reside in statute but in the common law -- "judge-made law", as it is often called, but "judge-found law" as it is better termed in the context of the "declaratory" theory of judicial functions (1).

The declaratory view of the judicial task also possesses the characteristic of being unverifiable; since there is by definition no alternative access to the self-existing "Law" other than the words of judges, there is no even theoretical possibility of independently ascertaining the "truth" of the claims of the declaratory theory. In this lie both its strength and its weakness. The law embodies the values of the society, and its progressive self-realisation in "decisions" of ever sharper particularity is the mechanism whereby it fulfils the "regulatory" function of which Eisenstadt speaks (Eisenstadt 1959), transmitting those values to the members of the society and eliciting (or compelling) their loyalty to the total political system to which they belong.

Smith's scheme has much to recommend it. The two analytical elements of power and authority seem to define two distinguishable components in social action, and moreover to do so in a manner that is sensitive to the "normative" or legitimate features that might be regarded, and with reason, as the defining characteristics of "law". But although Smith's scheme is useful for some purposes (as he himself has shown) it is only

a starting-point for the conceptual analysis of law. In the first place, there are certain theoretical difficulties in his way of discussing authority and power. It is more satisfactory to argue that authority is one of several possible bases of power than that it is a kind of power. Moreover, when Smith's scheme is applied to actual cases, it can lead to false conclusions about the processes described (2). Furthermore, the scheme is unbalanced. It implies that at one end of the continuum, the empirical correlate of (pure) "power" would be the Hobbesian war of all against all. This is acceptable enough in itself, but the polarity is not effectively balanced by any conceivable state of society at the other end of the scale. One way of approaching this is to observe that it is impossible to frame a rule that defines its own application. A second-order rule must be invoked to define the application of the first, and a third-order rule to define that of the second, and so on, in infinite regress. The purely "administrative" myth is conceivable only in a society where the law has no point of contact with concrete action at all: and where, in consequence, the problem of relating structure to event is eliminated by the expedient of eliminating events, and so eliminating sociology. It is, however, precisely in so far as law is "the point where life and logic meet" (Maitland) that it raises theoretical problems at all; therefore it is to that point, and not to points on either side of it, that any projected

solutions must be directed (3).

It is not proposed to review here the massive literature that exists on the nature of the judicial process (4). The "declaratory" view which has been presented above in ideal form is not accepted by jurists of any sophistication, though in modified form it still tends to represent the official doctrine of the courts, or at least of the "judicial folk-lore" that underlines the less academic jurisprudence of practising lawyers or judges (5). The existence of an efficient legislature naturally enables a form of declaratory theory to be workable, since enacted law can always be invoked to change the law as "found" by the court. But though the "declaratory" theory in se cannot be taken quite seriously by the analyst, it exists as an ethnographic fact in the legal thinking of many societies where law has not been codified. Codification implies the formal exposition of the law in systematic form and is normally followed and validated by legislative enactment. Although a body of case-law grows up round the code, this "jurisprudence" (in the French sense) is always referred back to the code and does not as a rule take its place or stand on the same level of authority. Consequently, the Code is the ultimate "Law" and if it is of recent origin (like the codes of most modern states, which owe their existence directly or indirectly to Napoleon) it is clearly not to be expected that a quasi-mystical attitude should grow up towards it. Only where a code

or corpus is of ancient origin does it emerge as "Law" in the sense in which the word has been capitalised above; thus the Roman Twelve Tables were still the formal object of reverence even in the time of Justinian, when their relevance to legal and social problems had long ago vanished (6). But where the law has not been codified, its origins cannot be determined by any particular human act to which a date can be given; it is regarded as issuing from God himself, or as having been delivered by a founding ancestor, or (rather less simply) as secreted by the society itself over immemorial time. It does not now follow that the acts and words of judges will be regarded as infallibly or by definition declaring the true law; least of all will this follow if the judges themselves are not members of the society in which they hold office; in this case, indeed, judicial activity is seen by members of the society as an act of power, both because the judge is regarded as a stranger to the Law, and because he is seen as simply one part of the alien government set over the nation; and indeed, in Basutoland, until the recent past he may well in his other roles have been a District Commissioner or other executive official (7). Furthermore, as a result of the changes imported into the judicial system by the British Government in 1938 and after (see Chapter Three, pp. above), no chief continued to act as a judge in his own ward and the number of courts was reduced in the course of a few years from over a thousand to

fewer than a hundred; in consequence, courts ceased to form a natural and daily part of the ordinary Mosotho's life; such courts as continued to operate were no longer so directly associated with the local chieftainship as such, and thus ceased to be implicated in the nexus of other relationships, economic, disciplinary, political, administrative and ideological, which characterised the chieftainship in the traditional society. All this meant that the Basuto courts, like the European ones though to a lesser degree, could not be regarded as ipso facto the authentic exponents of the "Law". The very affirmation that such-and-such a decision was not "our Law" implies the existence of this law as an entity existing apart from its expositors; and it does not need a long acquaintance with the Basotho to become aware that they regard their law as the special possession of the Sotho nation, expressive of its fundamental values and a major determinant of its identity.

The historical experience of Basutoland has given this insistence on legal identity and purity an urgency and immediacy that go further still to account for the juristic awareness and pride that mark the people. The basic principle of land-law -- that the land belongs to the nation (mobu ke oa sechaba) -- is the charter on which the Basotho have based their resistance to white colonisation and settlement (8). When sovereignty inhered in the Crown (as it did after 1870), chiefly ownership of the land became a main conceptual focus of

Basutoland's affirmation of a continuing if attenuated independence; since much of Sotho law is concerned with land use and administration, the will to preserve such independence as remained has stimulated an insistent loyalty to that law as such.

Sotho law as thus far considered forms part of Smith's "administrative component" of government and displays the features of the "juridical-cultural aspect" of the political system in its regulatory processes as analysed by Eisenstadt. Yet operationally it exhibits features that can be regarded as falling within Smith's "political activities", or forming part of the "executive aspect" of Eisenstadt's "implementary" process. This is the next question that arises here. In the traditional system, the chiefs discharged all the tasks that are now segregated, both in regard to subject matter and in regard to personnel, into the two mutually exclusive classes of "judicial" and "administrative" affairs. (It is for the present purpose unfortunate that the word "administrative" should be used, but its consistent employment in Basutoland makes it impossible to replace it with any other term; so long as it is understood that it does not carry the implications of the word as used by the two authors whose analyses have been largely relied on, no confusion will follow, and for ease of distinction the word "administrative" will be enclosed in inverted commas whenever it is used in either of their technical senses, and without them when it refers

to the present system in Basutoland.)

The underlying theory is that administrative matters are concerned with the modification, continuance or extinction of existing rights, and with the creation of new rights. "Judicial matters" are concerned with the declaration of existing rights (9). Further, the especial province of administrative action is precisely the chief's control over land allocation and deprivation, a matter with which the judicial courts have refused to concern themselves. The chief's freedom of action is, certainly, regarded as "circumscribed" by various rules; he has no jurisdiction outside his own ward, and no immediate jurisdiction outside his own immediate ward; he must consult with village heads before allocating land; and he must not be in breach of "natural justice" (he must not act mala fide, ka moea o mobe). To this extent, therefore, his actions with regard to the land fall within Smith's "administration" and are characterised by authority. But the field of decision-making that remains is very large, and it is this field which is regarded as administrative. (An administrative matter is thus within the "political" component, rather than the "administrative" in Smith's scheme.) Smith notes that a "political" element exists in every "administrative" structure, and in Basutoland this element must be reckoned as very extensive within this frame of reference.

Nor does the problem end there. Little distinction

was drawn, in the traditional system, between judicial and administrative affairs. The earliest reference to such a distinction being present in the minds of Basotho courts that was encountered goes back only to the early 1930's, and even here it was described to the writer as having been a new concept introduced by the colonial authorities (10). The chief filled various roles, which were not segregated. He acted as judge in disputes between his subjects, he adjudicated rival claims to land, he deprived persons of land where they had forfeited their right to enjoy it, and he allocated land to applicants; he maintained order in his ward and punished those who broke it; he issued instructions to his subjects, called upon them to labour in his own field, appropriated the fines paid to him in his court and witnessed all the major and many of the minor events in his village; he represented his own ward in a question with a higher authority, and transmitted the directives and policies of the higher authority back to his people. In all these crucial and various activities, the chief was fulfilling not a plurality of roles but the one role of "being a chief"; moreover, within his own ward he had the monopoly of the chieftainship (though subject always, of course, to the superior chief under whom he held his ward). In all his actions he was, of course, expected to conform to the law: not only in settling a dispute over a debt of bohali-cattle, but also in his allocation of land. Should he fail in his obligations under the

law in either of these tasks, appeal lay to his superior chief and from him to the chief above, until the resources of law were exhausted. The law of the Basotho, molao oa Basotho, furnished the principles in terms of which the chief was expected to carry out his chiefly tasks, whether these involved the "declaration of the existing rights of parties", as they are now regarded, or the creation of new rights and the extinction of preceding ones.

The 1938 changes initiated a new process which fundamentally altered this system. Reference has been made to the reduction in the number of courts and the introduction of the principle that no chief could be judge in his own ward, and to the effect of these changes on the degree and kind of participation enjoyed by the Basotho in general in the law and on the jural status of the new class of Court Presidents. The courts thus set up have come to be known as "judicial" courts (makhotla a kahlolo), and all disputes concerning the existing rights of parties must be brought before them for settlement. But though the chiefs were thus deprived of their judicial functions, they retained, as has been seen, all their other duties and privileges; in particular they remained responsible for land allocation, and for such elements in the process of land deprivation as were not regarded by the colonial authority as falling within the jurisdiction of the judicial courts. Chiefs had always acted in and with their courts (makhotla) in these matters, and it was anticipated that they would continue to do so, as

in fact they have (11). The system of appeals, though abridged, was also left structurally intact. In addition to this, matters concerning chiefly jurisdiction and discipline fell (after the 1959 constitution) within the province of the chief's courts, with a final appeal to the College of Chiefs. These are known as administrative courts (makhotla a puso), and concern themselves with supposedly administrative affairs. The internal operation of this arrangement has been discussed in Chapter Four; the purpose here is to assess its effect upon the status of law within the total political and governmental system. This has been two-fold; the separation of judicial and administrative affairs has had the effect both of eroding the legal character of the norms underlying what have become administrative processes and of displacing the role of equity from the judicial processes. An account of these changes demands as a preliminary the introduction of a further concept. This may be given the name of "abstraction", and is used in this analysis as an index of what can be called the "objectivity" or "subjectivity" of the jural processes that operate in a particular society. The distinction suggested is perhaps best illustrated in terms of ideal types (12). In a system of "objective" justice, the court restricts its attention to the issue before it and to facts and circumstances bearing thereon; legal concepts are precisely defined and narrow in their scope; laws of evidence are close and specific and are

strictly observed; the extent of "judicial notice" is as restricted as possible; the judge is socially and psychologically isolated, supposedly without parts or passions; he arrives at his judgment by isolating the issues of fact and law, both from each other and from every empirical and juristic consideration not bearing upon them, and by basing his decision on an assumed omniscient knowledge of pre-existing law as it applies to the case before him. This is the ideal to which the concept of legal justice in modern Western systems tends.

In contrast to this, in a system of "subjective" justice, the judge is personally acquainted with the facts of the case and with the parties to the dispute; the issue is not narrowly defined but extends to cover the history of the parties' relationship with each other and with other persons and to bring into judicial consideration all facts and circumstances that throw a light on this relationship; legal concepts are loosely defined and broad in scope; rules of evidence are generous and adaptable; the judge brings all his knowledge to bear upon the case, and is not expected to exclude the play of his own preferences and ideas in deciding it; he is fully integrated with his society and in formulating his judgment he pays special and conscious attention to the values of that society and to its current situation at the time of hearing.

This is the type to which the concept of justice

in chiefly society tends. The factor of abstraction is continuously variable, and could form the basis of a typology of justice: but of more importance here is the relation between the scale of abstraction on the one hand and the structure and organisation of a particular political system on the other. This relation can be clarified by considering the notion of functional specificity (Parsons 1939; 1954: ch. 2), in other words, the extent and kind of the division of labour and the differentiation of roles. Where such specificity is intense, it implies (in the judicial sphere) the selective appointment of specialised judges, who become a class of persons having the monopoly or near-monopoly of judicial work. Recruitment to this class will be based on skill, which in its most differentiated form will become professional skill (a further aspect of functional specificity), in terms of which the judicial quality takes on something of the colour of the "arcane". Relationships between persons are also functionally specific, rather than diffuse, roles being institutionally differentiated and the basis of their interaction "segmental" rather than "total", segregated rather than unitary. The matter at issue between two persons also becomes "specific"; it is narrowed to exclude the total relationship between persons that is composed by the fusion of their roles, and instead includes only the specific roles which are imputed to them in relation to the transaction being discussed. This implies the

rejection of "irrelevant" matters, the narrowing of legal issues, and the exclusion of "hearsay evidence". Since total (or multiplex: Gluckman 1955: 19) relationships are not involved, it also implies a strict attitude towards the onus of proof, since parties to a dispute must fill the specific roles of plaintiff and defendant. The specificity of the judicial role, defining as it does the office and jurisdiction of the judge, leads to the creation of precise rules as to the competence of the court and to an exact formulation of the sphere of its activity and concern. This whole pattern is protected and reinforced by the institutional isolation of the judiciary from contact with elements of the general society characterised by particularity, total relationships and diffuseness. This isolation can even be generalised to cover aspects of a judge's life that have no bearing on his judicial work. In this way, the judge tends to assimilate all his roles to that of his judicial function; the specificity of office expands to fill much of the other areas of his interaction. This process is typical of other offices, the most notable perhaps being the priesthood; and the policeman reflects something of the same isolation (13). It is significant that all these are involved at different levels and in different ways with the "juridical-cultural" aspect of the political system, and all three are to different degrees invested with a certain charisma of office. Although this may be seen from one point of

view as a confusion of roles, it is more properly regarded as a usurpation by one role of other potential rival roles, and is positively associated with the internal differentiation manifested by a political system. For example, in the contrasting case of the Nuek, the leopard-skin chief enjoys no particular respect outside his special function (Evans-Pritchard 1940: 172 ff.); and witchdoctors in Basutoland, where political differentiation (apart of course from the institution of chieftainship) is socially sporadic and limited, do not attract much particular respect when they are not performing their specific function.

This specificity of function extends into the substance of law itself. Legal norms themselves are, in the objective system, specific rather than general. The law becomes ever more precise, a given norm becoming more specific with each application. The apparent role of power is thus diminished as the clarity of definition grows. At the same time, the political differentiation of function within the social system implies the existence of a legislature separate from the judiciary, and this legislature discharges the specific task of legal change or "reform", which the judges have formally abandoned.

The "objectivity" of justice thus emerges as bearing a functional relationship to the institutional features of judicial organisation in the society as a whole. Both are functions of specificity. A converse

structure can be detected where justice is "subjective" and political differentiation is low. In traditional Sotho society, the overriding differentiation was that between chiefs and commoners. Chieftainship was one unitary role, within which sub-roles might be distinguished ad hoc but had no structural or institutional corollaries. Little distinction existed even between the "public" and "private" roles of the chief.

Relationships between commoner and chief as well as between commoner and commoner were diffuse rather than specific, their base total rather than segmental.

The proliferation of chiefs and courts and the large number of matters considered in the court meant that "every Mosotho was his own lawyer" and legal competence or technical knowledge was the possession of the generality of men rather than the arcane skill of the few. The immediate legal community (by which is meant the group frequenting the same lekhotla) was small and its members all knew one another and were personally known to the chief. In this diffuse context, the "judicial" function of the chief was not and could not be differentiated from his other functions. Legal issues were broadly framed and could be extended to include the total relationship between the litigants. Rules of evidence were few and wide; hearsay evidence was admitted, representation of witnesses allowed, relevancy was generously defined, and since litigants were not expected to fill specific roles with any precision,

the onus of proof was not specifically determined. Since the "lekhotla" itself had no specific function, questions of competence (other than territorial jurisdiction, which equally defined all aspects of chiefly activity) did not arise. The same generality characterised the legal norms in the traditional system. The formulae of the law consisted, as they still essentially consist, of general principles rather than of particular deductions from those principles -- or particular applications crystallising into law. This does not of course mean that law is not particularised in action. It means that the particularisation of the law is referable to a more general norm which is not replaced by the specific norm nor restricted by it in future application. Moreover, where the law appears to lay down a specific and narrow formula, it will often be found that an ad hoc rule has by accident become incorporated in a wider collection of legal principles but should not be regarded as juristically comparable with them. Nor does it mean that the formulae lack specific content. They are not abstract statements of theoretical principle but concrete statements of applied principle, with relevance to such major items of social concern as succession to chieftainship, inheritance of estates and the allocation of land. At a lower level of generality, these norms can be expressed in more specific form, but with each further specification, their juristic status is modified.

It will be apparent that the traditional system in Basutoland displays a degree of differentiation and functional specificity, of which the institution of chieftainship is the principal example. Within the chieftainship itself, the various levels are again differentiated, though here to a lesser degree. The wide hierarchical distance between the phala or molisa on the one hand and the Paramount Chief on the other is the limiting case, but any two different levels are structurally differentiated to some extent. Furthermore, there is an ecologically derived differentiation arising out of the different uses to which land is put in the cattle-post country on the one hand and in the arable lowlands and foothills on the other. This is an "organic" rather than a "mechanical" differentiation, since the two principal ecological zones are enmeshed functionally, lowland stockowners sending cattle to the cattle-posts in the summer and the mountain dwellers relying on the lowlands for many of their own supplies. If, therefore, a functional relationship exists between the degree of political differentiation on the one hand and the scale of abstraction on the other, it would be expected that the traditional legal system of Basutoland would reveal a degree of "objectivity" roughly comparable to the extent of its internal political differentiation. The judicial task of the chiefs encourages this expectation. They stand (or stood) in a position mid-way between the non-institutional procedure of reference of an almost

undifferentiated political system and the fully institutionalised process of western type. There are three significant possibilities in a "judicial" system: in one, reference is made to a person or set of persons who emerge as leaders and "judges" by their individual attainments and who exercise "judicial" powers on an informal, non-institutional and largely arbitral basis. In the second, reference is made to specialised judges who have no other social or political role and who possess unique and compulsory jurisdiction by virtue of their office. Between these two, however, there is the case of the Sotho chief, who indeed exercises judicial functions by virtue of his office, and who enjoys unique and compulsory jurisdiction, but who is nevertheless not specialised, having instead a variety of other tasks to perform which are not structurally or "ideologically" differentiated from his judicial function. This is the legal analogue of the type of differentiation that has been observed in other areas. The judicial role is differentiated to the extent that it is a monopoly of the chieftainship but undifferentiated to the extent that it is not institutionally or conceptually segregated from the chief's other roles.

The question thus arises of how far this limited specificity of function may be said to be reflected in the degree of "abstraction" manifested by Sotho law. Land law provides one point of entry into this area of inquiry. There is an ecological differentiation, as

seen, between the cattle-post country and the arable areas. The law reflects this differentiation, stating for instance that the "leboella" (pasture) belongs to the nation and that administrative control over it is vested in the chieftainship, whose responsibility it is to "open the leboella" -- declare pasture land in particular wards open to general grazing. The general norm -- national "ownership" of maboella -- and the means of its implementation -- control of maboella by the chiefs -- are both specified in the law. But below that level of generality, it becomes increasingly difficult to specify the specific norms or "rules" that control the exercise of the chief's functions. They are not, in fact, predictively specifiable in juristic form, but are always referable to the more general norms. Arable land on the other hand is distinct from cattle pasture, and the law is "specific" in reflecting this differentiation, being here concerned with the allocation and deprivation of arable lands to village subjects. Beyond the enunciation of certain general norms controlling allocation, however, the specificity again falls away. In deprivation, the law is more specific and rules of law control some detailed applications of the chief's rights to deprive a man of validly allocated lands. It is not, perhaps, pursuing the argument too far to suggest that here too the difference in specificity (between allocation and deprivation) is a function of the degree of differentiation of parts.

Where land is to be allocated, only two elements are differentiated: the chief who holds the vacant land on the one hand and the landless applicant on the other. But where land is to be withdrawn, there are three elements -- the chief, the landless applicants, and the existing landholder himself. Thus, the extent of differentiation can be related to the specificity of law, which is itself one of the indices of "abstraction".

A similar relation can be seen to hold in the field of procedure, Sotho law once again being intermediate between the "subjective" and "objective" types: and it is possible to account for differences between kinds of rule in terms of the contrasting dimensions of differentiation within the social structure. For example, there are two important rules of Sotho customary law in regard to debt. One states that debts do not cancel each other out (melato ha e lefane). This can be regarded as an "objective" rule of procedure, implying as it does a concern to distinguish plaintiffs from defendants, to impose restrictive rules of relevancy and to segregate issues. The other customary rule states that a debt does not prescribe (molato ha o bole, literally "a debt does not rot"). This could be classed as a "subjective" rule, emphasising substantive rather than formal justice and ignoring such technical rules as prescription and time-bar. Both rules find their major application in the field of bohali debts. On the one hand, relationships would be exposed to uncertainty if

any kind of communal accounting cancelled debts against each other and left only net creditors and debtors outstanding: a father might find himself owing three head of cattle to a family with which he had no visible relationship at all. The rule against set-off ensures that bohali reciprocities are not cancelled out in this way and that affinal relationships are concretely and individually structured along identifiable and specific transfers of cattle. Each debt is a separate obligation that must be specifically rendered. Conversely, the rule that debts do not prescribe is a necessary one, given that on the basis of a standard payment of twenty cattle relatively few households could afford to pay all of them at once. The debt must carry over into the next generation if necessary, and cases involving bohali obligations going back over thirty years occur. On the principles that monna ha a shoele and nts'o-salla o salle le molato (discussed in the preceding chapter), no distinction is drawn between different generations of the continuing lineage (14).

Thus, a rule that has an "objective" and specific character is associated with the structural differentiation between exchanging groups, whilst a rule that has a "subjective" and generalised character is associated with dimensions of structure that emphasise the homogeneity and continuity of the lineage enduring through time. These differences, of course, can be explained concretely, as shown, by relating them to the functional

necessities of marriage alliance as an empirical institution: the concept of structural differentiation does not constitute a rival but a supplementary mode of analysis, which suggests a way in which social structure, judicial organisation and "legal rules" can be related each to the other in a theoretically rigorous manner that passes beyond statistical correlations on the one hand or a mechanical notion of causality on the other. It is not simply that one kind of rule is "found to occur" in association with one kind of structure; but nor is it the case that when a given rule is once explained by the functional necessities of a particular institution associated with it, analysis must then stop. The rule and the institution alike are jointly and severally open to an "explanation" that overarches them both.

The relations suggested here are to be seen again in the rules of evidence that prevail in the Basotho courts, and in the conception of the judge's role. Hearsay evidence, for instance, is accepted if the witness is reliable. A village head stated "I am a letona (chief's counsellor); I know what happened because I am molisa (the village head) and I know the village's affairs". His indirect knowledge of events leading up to an act of arson was relied on by the court (*Moleko v. Motsumi* J.C. 3/58). In another case, the judge in the court of first instance made a private inquiry into the facts, and on appeal he represented

the principal witness (Kente v. Sohane J.C. 17/46).

A judge at Maja's court relied on his personal knowledge of a boundary in reaching his decision in a land dispute (Rannana v. Sehloho J.C. 194/55). In a case at Senekal, a village near the District capital Teyateyaneng, the court took judicial cognisance of the appellant's trade as a tailor in Teyateyaneng without evidence being led ('Motlamelle v. Lerata J.C. 172/57). These cases are significant because though they display "irregularities" in terms of objective Western legal systems, they are not "irregular" from any other point of view and are in themselves quite compatible with, even positively conducive to, the doing of "justice between man and man". They also illustrate the limited role-differentiation of the traditional system -- the judicial role is not fully segregated from the other roles (observer, actor, leader) carried by the office holder. The traditional attitude to the onus of proof reflects this again. Onus is not strictly apportioned and (if anything) tends to lie on the defendant -- a procedure which is consonant with the diffuseness of relationship that marks the traditional society (Parsons 1954: 39). In Mangana v. Tlali J.C. 50360 it has been seen how 'Maphiri was sued for two goats by Albinas Tlali. She admitted that she had borrowed them from the plaintiff, but claimed she was not liable since she borrowed them not on her own behalf but in respect of her 'mangoane who had died, so that the liability attached to the deceased's

son, her classificatory brother (khaitseli) Moela. The court of first instance found for the plaintiff, but the A Court found that the debt bound Moela, and that 'Maphiri was wrongly sued. The court, in other words, looked outside the immediate issue between the litigants and ascertained the person who was ultimately liable. On appeal, the Paramount Chief's court reversed the A Court and decided that 'Maphiri was liable in a question with the plaintiff, though she would have recourse against Moela as a separate issue. This was a reasonable decision, since it is clearly not the plaintiff's duty to know all the internal affairs of the defendant's family and to make sure that he sues the ultimate debtor. Yet this is a relatively "objective" attitude to justice which would probably have had little place in the traditional society, where it could often be assumed that people knew each other's affairs. This case is also of interest as showing the uncertainty of the courts, one taking one view and another taking the opposite -- a difference of attitude symptomatic of the transitions through which the courts and their presidents are passing. Nor is it a coincidence that in this case it was the Paramount Chief's court that took the more "objective" view, and the lower court that took the "subjective" one. The Paramount Chief's court on this occasion was presided over by a particularly "well-trained" and "instructed" judge.

The same thesis can be illustrated by the many cases

where the Basotho courts have -- even after their formal separation from the administration -- acted within the context of "subjective" justice, and drawn little distinction between judicial and administrative tasks. The traditional system of the Chief's court is here seen in action, perpetuating itself in the judicial courts in spite of the determined efforts of the colonial authority to bring about a "separation of powers".

A chief ordered the arrest of a thief and ordered him to move into the chief's village where he could be kept under surveillance (*Molapo v. Kolia J.C. 84/44*). The chief was here acting both as prosecutor and judge, a practice perfectly consistent with traditional practice and not open to obvious abuse in a context of total and diffuse relationships. The same practice is evidenced by a case where a chief ordered a man to remove (as he was entitled to do), and when the man failed to do so, the chief demolished his house instead of presenting him for prosecution in court (*R. v. Rantletse 1926-53 H.C.T.L.R. 226*). In another case, a headman resented the placing of Chief Letsie Thella above him, and refused to recognise his authority, persisting in this recalcitrance even in the face of an unfavourable judgment. Letsie in the end and after due warning took direct action against the headman and his party, ploughing their crops under instead of taking them before the court (*Tsikoane v. Thella J.C. 92/52*).

The Paramount Chief, as noted in Chapter Two and

Three, regarded herself as entitled to alter the judgment of her judicial as of her administrative court, and indeed was barely aware of any difference between the two. Her judicial appeal court stated (*Lerotholi v. Monyoe* J.C. 189/45), "The Paramount Chief has the power to quash or confirm or add to any judgment as she sees fit". Chief Letsie of Leribe in *Moqa* J.C. 206/49 stated that before 1946 "we had all powers as chiefs; we were quite free to alter judgments" -- an incorrect assessment of the position after 1938, as it happens, but revelatory of the chief's view of their relation to the judicial courts. The colonial government's efforts to separate the administrative ("political") functions from the judicial were not so much resisted as not understood. Thus the Paramount Chief's Court in a civil action between two parties took the area in dispute away from both litigants and awarded it to a third party (*Seeisa v. Ntsoereng* J.C. 31/45). It either ordered a litigant to allocate land (*Matjeketjela v. Theko* J.C. 19/47) or itself did what it considered the chief should do, allocating land to the persons who in its view were those to whom the chief should have allocated it (*Mafetoa v. Mothebesoane* J.C. 256/48). The tendency for the courts to continue to identify themselves with the chieftainship expressed itself in sometimes quite open affirmations of solidarity. In one case, the Paramount Chief's Court came very near to saying that as a matter of law parties must appear before the chief in his

lekhotla la tlhopho before going to the judicial courts at all (Moqhetsola J.C. 19/50), and referred to the judicial court of first instance as an "Appeal Court". In another previously cited case, the Paramount Chief's Court said, in a criminal appeal, "we do not allow this case to go on as it causes Chief Matlere displeasure -- he is a son of Lerotholi and so are we" (Phakisi v. Borena J.C. 69/54). Such a point of view would probably be felt as an abuse of justice in any system, but many of the underlying attitudes are shared by commoners as a whole. Thus, a litigant wrote to the Judicial Commissioner in a pending appeal, giving a history of his opponent's criminal record (Kali J.C. 4/59) -- a litigatory attitude suggestive of discretionary power and implying evidential rules that are only intelligible in a context of subjective justice. In this instance, the fact that the Judicial Commissioner was a European introduced into the situation a "foreign-ness to the law" of the kind mentioned above and thus inserted a judicial proceeding into the general "power" structure of the White government. It was an unforeseen irony for the litigant that he should have made this assessment of a judicial office that had, of course, committed to the most objective concept of its function (15).

Conversely, the analyst of legal processes in Basutoland is struck by the "legalism" of the Judicial Commissioner's Court, that is, by its retreat from the field of "discretion" and "power" into that of "authority"

and "administration", and by its tendency to narrow the generality of customary norms by imposing on them a specificity that distorts their content. It has been seen in the preceding chapter that the principal heir has the right, in consultation with the "family", to distribute his deceased's father's estate; but he is also under an obligation to make provision for certain of his father's (now his) dependants. Traditionally, the Sotho courts regarded it as equally the law that the heir must decide, and that he must decide in accordance with the law. But in a case where the lower court undertook the distribution of an estate, making references to good family relations and the moral duties of a man, the Judicial Commissioner simply stated that the decision lay with the heir and that the courts were not competent to intervene. Furthermore, the Judicial Commissioner remarked that the question was not relevant to the plaintiff's claim and so was not properly before the court at all (Nthathakane J.C. 78/44). The senior court was here applying a severely objective test of relevance, and insisting upon a rigorous demarcation of the sphere of enforceable legal rules and the sphere of "discretion". The effect is to sever the ties binding that "discretion" to the rules of law and to ensure that, authority being powerless, power must in compensation be exercised without authority. In another case, the lower court directed, inter alia, in a matrimonial dispute between a polygamist

and his senior wife, that "the saw, saddle, hammer, table, axe" etc. were to be restored to the senior wife's house, and that if this were not done the husband would be deprived of his lands ('Matsoana J.C. 85/45). Here, the court was acting as a chief might act, in its threat to deprive the defendant of his lands, and also giving precise directions as to the disposal of property. The Judicial Commissioner rejected the lower court's claims and declared that the whole matter was not justiciable.

Another series of cases concerns the legal position of chiefs who act unfairly in opening the leboella (grazing grounds) to cattle owners. The separation of judicial and administrative affairs has gone far to excluding the superintendence of the courts over the actings of chiefs, on the grounds that the law leaves the decisions to them. Thus, in one case, the Paramount Chief's Court stated -- impeccably -- that "maboella ke a sechaba", "the maboella belong to the nation", stating that it is not the law that "a chief can do as he please unfairly". On appeal, the Judicial Commissioner remarked that favouritism was deplorable, but added that although "leboella is for the nation and not only for the chief and his friends", the court cannot enforce this rule or give directions (Masupha v. Mabu J.C. 261/48).

Land allocation and deprivation raise similar questions in acute form. In the previously noted case

where a chief gave or lent some land to his brother for the support of the latter's children, the donee's son claimed the land when both the original parties to the transaction were dead (*Mafetoa v. Mothebesoane J.C.* 256/48). The donor's son resisted the claim, and the Paramount Chief's Court acted as (in its view) the chief should act towards his brother, upholding the claim of the original donee's son. "It is difficult for the court to undo what was mutually done by your fathers". It is settled law that "land is not an inheritance" (ts'imo hase lefa): it is equally clear that in Sotho law attention must be paid to the claims of sons and relatives in allocating the lands of deceased land-holders. But the Judicial Commissioner applied the rule of non-inheritance so as to uphold the claim of the chief (the original donor's heir) to the deceased's lands; in an analogous case, the Judicial Commissioner further declined to make any appeal to the chief to be generous to a rejected claimant, since it was not the Court's function to interfere (*Seetsa J.C.* 301/49). Among the effects of these changes has been to release the area of "discretionary" activity from legal control. In one case, this took a bizarre form, when an employee of the National Treasury at Matsieng sued for wrongful dismissal and found his plea rejected on the grounds that the matter was an administrative one. It was left to the Judicial Commissioner to explain that an illegality remained actionable even though it took

place in the administrative sphere (*Makhele v. P.C. J.C.* 137/55). Such a reading of the relative positions of the judicial and administrative courts was, however, not uncommon. In *Mothibeli v. Lesaoana J.C.* 52/50, the chief of an area acted under the impression that he could not make an administrative decision in an opposite sense to the judgment of a judicial court. This recalls the case of *Thipane J.C.* 183/60, discussed in Chapter Five; it will be remembered that the lekhotla la puso of the Chief of Tsikoane had awarded a land to Thipane on the grounds that it had belonged to his father. This was, of course, not merely a lawful decision but in fact one which reflected the principle of succession and "quasi-inheritance" that has been noted as underlying the customary law of land allocation; but the judicial Court at Peka rebuked the judges at Tsikoane, on the ground that they had acted as though land were an "inheritance" (ts'imo ke lefa). The implication of this rebuke was that only by acting in an arbitrary manner and expressly renouncing any guiding principle of action could an administrative tribunal avoid the charge that it was assuming a rule of law. In *Motjoli v. Rametse J.C.* 106/58, Chief Makhabane was placed virtually in the position of having to act as unjudicially as possible in order to have some assurance that his administrative decision would be upheld as valid by the judicial courts. These are instances of the way in which the institutional polarity of judicial and

administrative action not only confined the judicial courts to a "legalistic" and inflexible view of their function, but also obliged the administration to act arbitrarily. The courts were inhibited from exercising the functions of equity, while administration was stripped of the guidance and inhibitions of law (16).

The judicial/administrative polarity suggests a framework in which each of the two terms has certain attributes and an ideal sphere of operation. Thus, the judicial is seen as rule-governed, and hence constrained, and is concerned with the area of right; the administrative is seen as discretionary, and hence free, and is concerned with the area of power. But these oppositions do not enter into that "executive law" which was described in Chapter One as the characteristic legality of chieftainship, and of which customary law is perhaps not so much a synonym as a special case (17). It has already been suggested that to follow a rule is not necessarily to be constrained (18); and it is a feature of Sotho law that an outcome can be both lawful and legitimate even though an alternative conclusion could be argued to be equally derivable from the "rule".

It must be reiterated that what is involved here is not the familiar "judicial" criterion of whether or not the act in question fell within the competence of

the actor. According to this criterion, an outcome is lawful if it falls within the area of "discretion" left "free" by the circumambient rules -- if the chief, in other words, is acting "within his authority" in the exercise of his power. (The only exception to this is that he should not have been in breach of "natural justice" and so rendered himself liable to a review procedure which however cannot concern itself directly with the merits of the case in hand (19)). The proposition advanced here is not of this kind. It is certainly the case, as Chapter Four has shown, that a Sotho chief must keep within the circumscription of his particular office and authority; but it is not the case (in the traditional system, at least) that all his acts within that circumscribed area are surrendered to a "discretion" fettered only by the rules of judicial review. Legality enters into his decisions as well as bounding them, and these are in principle open to challenge on their merits. Conversely, it is not the case that legality itself is constrained by "decision-inevitability" in such a way as to imply a unique outcome. The "rules" of customary law reside in concrete but general norms, whose ambivalence, or ambiguity, permits a variety of possible outcomes, each one of which can be formally proposed and argued for as "legitimate". It is true that one face of this is that what are in effect "political" outcomes receive a factitious and post factum legitimation derived from

norms that would justify almost any decision. This is the point at which the ambivalence in all Herrschaft is found, and it is here that the current dilemma of chieftainship has become explicit: the folk-ways, and the ways of the folk in power. But a facile reductionism only obscures the contours of all legitimacy, obliterating the discontinuities of consciousness and offering in their place a platteland of undifferentiated "interests" that falsify the empirical reality while purporting to explain it (20). For the other face of executive law is to acknowledge no power that is not also authority, to reject the dichotomy of "right" on the one hand and discretion or freedom on the other, and to bring into conjunction the divided and distinguished worlds which the folklore of "judiciality" sets apart.

Not the least interesting aspect of these processes is that the deceptions and "false consciousness" of executive law -- its temptation to obscure the bifurcation and intertwining of legitimacy and self-interest -- should be so neatly paralleled by the equal inability of judicial systems to conform to the requirements of their own ideal theory. The presence of an institutionally specific legislature -- the precondition of any plausible judicial system -- cannot eliminate the need for decision, nor can it, at the level of theory, constrain or determine the decision that is made. In practice, however, it can obscure the nature of the decision-making process that is involved, by presenting the outcome as

inevitable, and thus as not a "decision" at all; conversely, what is not inevitable is not seen as law. But to give a reason is not to postulate an efficient cause, nor is it to argue for a logically unique outcome; the juristic repertoire at the disposal of Sotho customary law enables a decision to be both reasonable and legitimate, since norms are not progressively specified into constraining rules (and can therefore remain reasonable), while decision-making is normatively controlled (and can therefore remain legitimate).

NOTES TO INTRODUCTION

(1) Very little of the material in this section is original. The main sources are: Lesotho (Central Office of Information Pamphlet no. 73), H.M.S.O. 1966; Basutoland Constitutional Handbook 1960; Report of the Basutoland Constitutional Commission 1963; the Official Gazette; 1956 Population Census (Basutoland); Sheddick 1953; Hailey 1953; Morojele 1962; Ramolefe 1970. See also Hailey 1963; Halpern 1965; Stevens 1967 (but cf. Hamnett 1967^a); Spence 1968; Weisfelder 1969; Wallman 1969.

(2) The leader of the BNP, Chief Leabua Jonathan, was defeated in his own constituency but an early bye-election, arranged for the purpose, soon enabled him to enter the house and become Prime Minister.

(3) Political tension remained at a high level after independence (see Spence 1968: 52-3). As the votes were being counted after the General Election in January 1970, Chief Jonathan suspended the constitution, proclaimed a state of emergency, cancelled the elections and ruled through an extra-constitutional Council of Ministers. A few months later, the King left Lesotho to take up temporary residence in the Netherlands. The political significance of his departure and the duration of his absence are uncertain at the time of writing.

(4) 29° 36' S 27° 29' E. The village is also known as 'Ma-Jane's (after the Christian name of the former white manageress of the store), and is wrongly given as "Palama" in the map published by the Directorate of Colonial Surveys.

(5) In some respects a good case can be made for the South African orthography, especially in its use of w and y for the semi-vowels denoted in Basutoland by o and e, and (though much less incontrovertibly) in its adoption of d instead of l before the vowels i and u. Its main defect lies in its failure to distinguish the second and third person subjectival concords: "you are happy" and "he (she) is happy" are both written o thabetse.

(5) cont.

This is, strictly speaking, correct, since the vowel in both cases is the close o (u). In speech, however, there is a tonal distinction, the second person tone being low and the third person relatively higher, and this distinction is conveniently if inexactly recognised in Basutoland by the use of u and o respectively.

The marked visual difference between the two orthographies can be seen in such words as the following (South African form in brackets): khoeli (kgwedi), 'nga (nnga), chaea (tjhaya).

(6) The law of husband and wife is not formally discussed. Although references to legal aspects of marriage, divorce and filiation are inevitably common, in as much as they bear upon most of the topics considered, I have offered no systematic treatment of this field of law. Reference may be made to Ashton 1967: 62-87; Sheddick 1953: 33-39; Duncan 1960: 19-42.

NOTES TO CHAPTER I

(1) Reference has been made in the introduction (section i, sub-section b) to the widespread literacy reported for Basutoland. All Basotho Courts keep records of the evidence and judgments in interleaved carbon books, the carbon copy being remitted to the superior court on appeal. But there is no general dissemination of judgments. However, in instances considered important by the Judicial Commissioners, copies of judgments are from time to time circulated in an attempt to procure the Basotho Courts' adhesion to them. The response is sporadic. Individual Court Presidents sometimes display in their own decisions an awareness of the higher court's judgment, but the frequency with which the same points come up on appeal over the years shows that this is more the exception than the rule. In any event, this whole procedure is a relatively recent introduction and did not obtain until modern times. It is certainly true that written records dating back into the earliest years of the present century and beyond exist, and are frequently relied on by courts and litigants; but they are used to validate particular claims, and in nearly all cases they are produced to support a right by pointing to a decision granting or affirming it, rather than to establish an abstract principle drawn from a decision on other facts.

(1) Much of the theoretical and analytical material in this chapter has been presented or adumbrated in an earlier article (Hamnett 1965). I am much indebted to Mr Makhaola Lerotholi's criticisms of that publication; many of his suggestions have been incorporated into the present formulation. I nevertheless maintain my basic argument, and for this Mr Lerotholi, as a confirmed "retrospectivist", would be the first to disclaim responsibility.

(2) See Hailey 1953, as supplemented by Basutoland Constitutional Handbook 1960. See also Report of the Basutoland Constitutional Commission 1963. For the 1966 position, see Basutoland Order 1965.

(3) Mabile and Dieterlen 1961: 427b. Cf. the form of address or reference to a chief's wife, etc., mofumahali, from ho fuma, to be rich. Casalis's comment (1930: 268-9) is perhaps unduly swayed by sentiment: "Ce mot à une très belle origine. Il est formé du verbe rëna: être prospère, être tranquille. Morëna signifie donc: celui qui veille à la sûreté et au bien public."

(4) An analogous usage is found in the chiefs who objected to the 1944 proposals for centralising court revenues. Fearing that the change would impoverish them, they complained that "Moshoeshoe will starve" (Moshoeshoe o tla lapa), v. Basuto National Treasury Explanatory Memorandum sec. 49.

(5) See below in this chapter, and also Jones 1966: 77 ff.

(6) Throughout, the terms "senior" and "junior" indicate rank, while "elder" and "younger" indicate age (though within the same house, age, of course, ordinarily implies seniority).

NOTES TO CHAPTER II (cont)

(7) When Seeiso succeeded to the Paramountcy in 1939, he remained Principal Chief of Mokhotlong. The Tlokoa thus became directly subordinate to the person occupying the throne, though in his capacity as Principal Chief. This helped to ease the transition. Mokhotlong remained a ward of the Paramount Chief until the present King awarded it to his full brother Mathealira. However, at the relevant time, Griffith intended his son Bereng to succeed him, as shown below, so that the actual result was neither planned nor wished for. It may also be observed that the mother of the present King is the daughter of a Tlokoa headman in the ward of Mokhotlong.

(8) Under the 1965 and the existing constitutions the twenty-two are also ex-officio members of the Senate; the College of Chiefs still exists, but with diminished responsibilities (see Introduction, sec. i) sub-sec. (f)).

(9) Basutoland is divided into nine administrative districts (Butha-Buthe, Leribe, Berea, Maseru, Mafeteng, Mohale's Hoek, Quthing, Qacha's Nek and Mokhotlong). These do not generally cut across Principal Ward boundaries (at least by intention), though most districts contain more than one Ward. But in a few cases this does happen, and in the present instance, which is one of them, it is more convenient to consider only the Maseru section of Rothe and Masite etc., and not that in Mafeteng.

(10) See also Chapter Three for a more detailed discussion.

(11) See for instance Ellenberger 1956: 13, 112; Legassick 1969; Lye 1969.

(12) Professor Edward Batson, Director of the 1956 Social Survey of Basutoland, has in a private communication informed me that the population of male heads of households described as "Kwena" in the 1956 Social Survey was thirty per cent.

(13) The basic accounts of Moshoeshoe's life and work may be found in any history of the area, for example, Ellenberger 1912; Lagden 1909; Hailey 1953. See also Wilson and Thompson 1969 and Thompson 1969. Becker 1969 is a popular but not valueless account of the life and times of Moshoeshoe.

(14) Wives are here said to be ranked in order of their marriage. Arguments are sometimes directed against this view -- for instance to claim that the mother of the present Paramount Chief should not have been considered Seeiso's second wife in view of her Tlokoa origin. Nevertheless, Sotho customary law has traditionally laid much stress on the order of marriage and in this respect differs from the case of the Swazi Kings (Kuper 1947). See also below in this chapter, where Griffith attempted to manipulate the seniority of his wives in order to promote his son Bereng. The Anonymous of Leribe, also, argues that Jonathan Molapo's third wife should have been the senior, since she was a Mokoteli (Anon. 1928: 5). The question cannot be regarded as entirely settled. Ashton's view that "nowadays, the first wife is always the senior wife, but formerly this was not always so" seems as good a way of avoiding the issue as any (Ashton 1967: 193). The ranking applies especially to the first three wives; subsequent wives are separated from the first three by a wider distance (unless the only male is born to one of them: but in such a case he would normally be adopted into the senior house). A fuller discussion of the problems of fact and law in the

(14) cont.

ranking of wives and houses, with special attention to the question of subsidiary marriages, is given in Chapter Six sec. II below. See also Appendix II.

(15) Details of the events here alluded to are in Lagden 1912: 583 f.; Jones 1966: 70-71.

(16) Hence the "Laws of Lerotholi". These were revised in 1922, 1946, 1955 and 1959. Part I of the present version is a self-styled Declaration of Basuto Law and Custom and is printed in English as an appendix to Duncan 1960.

(17) Cf. Laws of Lerotholi (1959) Part I sec. 14 (4). This provision is indubitably "customary" and is discussed in Chapter Six below, especially section V. See also Appendix II.

(18) *Sekake v. Tautona C.C.* 70/57 (Qacha's Nek) and J.C. 15/59, discussed at length in Appendix II. Other formulations are ngoana ke oa khomo (the child belongs to the beast); khomo e kopanya batho (the beast joins people together). Note, however, that it is the payment of the bohali and the person of the payer that count, not the identity of specific beasts. Leenhardt 1939 appears to be quite mistaken.

(19) In point of fact, a posthumous child was born to one of Letsie's widows in 1918 (five years after Letsie's death). This man is Makhaola Letsie, whose genitor is commonly supposed to be chief Goliath Moshoeshoe. This old man (Goliath) holds a peculiar position in Basutoland. Although not a member of the "twenty-two", he holds the ward of Likoeneng directly of the Paramount Chief. He comes from the third house of Moshoeshoe's father, Mokhachane, and is the son of Senate's daughter

(19) cont.

Lets'abisa. On the basis of this paternity, Makhaola (like Goliath himself at one time) has claimed the right to the Paramountcy. Recently Makhaola was involved in a dispute with a man who, he alleged, had seduced his daughter. The interest lies in the fact that Makhaola fixed the bohali at fifty head -- a scale appropriate to a major chief (Makhaola v. Bolae J.C. 182/64). (Makhaola himself married a daughter of Griffith from his senior house.)

It is sometimes argued, however, that a union between Goliath and 'Ma-Makhaola could not be a case of kenelo, since Goliath's matrilinear descent made Letsie -- and so also 'Ma-Makhaola -- a malome (mother's brother/mother's brother's wife) to him.

Makhaola also raised an action against the Paramount Chief, claiming the right to a ward at Likhoele, where Letsie II had a personal ward and where he left his widows. The Paramount Chief's court rejected the suit, remarking that "You father is still alive, in the name of Paramount Chieftainess 'Mantsebo" (C.C. 152/46 Matsieng).

(20) Strictly, seantlo probably applies only where the wife of the first house dies childless and a sister is provided in her place for reduced bohali. In the present case, Sebueng was not of the first house, she was not childless and she did not die; and no cattle were paid. But Duncan is probably too strict in his reading (1960: chap. 19, esp. sec. 3) and is not supported by Ramolefe, n.d.

(21) See Bereng v. 'Mantsebo supra: Ashton 1967: 196 f. The issue appears to have been further complicated by the fact that 'Ma-Bereng was Griffith's favourite wife, whom he married civilly and ecclesiastically (Griffith

(21) cont.

was the first Paramount Chief to adopt Roman Catholicism, now the religion of most of the higher and middle chieftainship and the dominant faith of the country: see Basutoland 1956 Population Census Report (1958) and Introduction Sec. 1) sub-sec. (b)).

(22) This is a suitable point at which to note a further question about Laws of Lerotholi (1959) Part I sec. 2. It is not always the case that women are only regents. This indeed happens, and very commonly, when the deceased leaves a minor heir: the senior widow (not necessarily the heir's mother) normally now acts as regent until the boy comes of age. But if a chief dies without male issue, the senior widow reigns until her death as a chieftainess in her own right. However, this does not interrupt the line of succession, which passes to the nearest agnate of the deceased, commonly his brother. The matter is more fully canvassed in Appendix II, In 1964, something over 130 chiefs were women, of whom the greater number were gazetted as reigning in their own right, though the gazette was probably wrong on this point.

Many Basotho regard the present position of women as contrary to traditional law, and in this they are certainly right. More objection is taken to women as regents than to women as full chiefs, since a woman chief would traditionally be under guardianship, whereas a regent is expected to exercise it. Bereng argued this in his case against 'Mantsebo, 1926-1953 H.C.T.L.R. 50. The current Laws of Lerotholi display a sensitivity to this issue, in that while nothing is said about female succession to chieftainship, sec. 11 (2) recognises that a woman may be an heir (mojalefa) though she must still consult with the brother of the deceased.

(23) See Lagden 1909; Jones 1966: 77-80; Germond 1967: 372-4, 389, 399-401, 403. Illuminating evidence is provided by Anon. 1928, a precis of which follows below. Disputes over the succession to Chief Mots'oene (Mots'oene 1954 H.C.T.L.R. 1, discussed in Chapter Six sec. II).

(24) The Khoakhoa people occupy a ward under their own Principal Chief in the north, but this is not in any meaningful sense a part of the Molapo ward.

(25) This leads Sheddick, following some colonial government practice, to regard the Chief of Leribe as a "Provincial Governor" over the whole of the North (1954: 28-9).

(26) In a private communication, Dr Antony Atmore of the University of London has suggested that the author is probably the historian and folklorist Azariele Sekese.

(27) Mots'oene was the son of Joseph and Senate, Letsie I's daughter from his first house. Moshoeshoe took no bohali, intending the succession to pass to the child of the union. Cf. Jones 1966: 70-1.

(28) Part of the other side of the story is in Germond 1967.

(29) Matsieng archives contain records of land and area disputes going from Leribe to Matsieng from the reign of Letsie II.

(30) His father, Gabashane, was executed after conviction for medicine murder, together with Chief Bereng Griffith. Bereng's son, Letsie, succeeded as Principal Chief of Phamong, a ward carved out of the Paramount Chief's area and representing the segmentation of Lerotholi's house between Letsie II (Likhoele) and Griffith (Phamong). See Appendix III Fig. 2. cont.

(30) cont.

It is pertinent to note that these two executions gave rise to enormous eclat, since two of the most senior chiefs in Basutoland were involved; moreover, whereas Gabashane owed his preeminence to his heirship in the cardinal house of Masopha, Bereng owed his to his proximity to the existing Paramount; the two principles of seniority were thus neatly juxtaposed. A similar juxtaposition of a "cardinal" chief and a "junior royal" can be found in the Basuto National Treasury Explanatory Memorandum issued in 1944 by the Paramount Chieftainess, setting out the proposals for the new system. Among these were arrangements for paying salaries to the Chiefs. In most cases, the capitational basis was adhered to, but special exceptions were made for Bereng Griffith and Majara. Bereng was given an extra allowance on the grounds that he was "the senior chief in Basutoland after the Paramount Chief" (morena ea kaholimo ho a mang mona Lesotho ea hlahlamang Morena e Moholo); and Majara received an increment on the grounds that his normal allowance was too low for a "Chief of his status in the house of Moshoeshoe" (morena ea kaalo ka eena Ntlong ea Moshoeshoe). Bereng was of course the son of Griffith, and Majara was the successor to the fourth son of Moshoeshoe's first house. (However, Bereng thus received a total salary of £1,700 per annum, but Majara only £300.)

(31) This phrase indicates the fullness of succession of an heir to the rights and liabilities of his predecessor, without distinction of generation ("the links of a family are unbreakable through generation and generation", as Ezekias Labane argued in his case against his nephew's widow: *Labane v. Lichaba* J.C. 334/49). Cf. the Paramount Chief's Court's reminder to Makhaola Letsie quoted above, note 19.

(32) It was precisely as "the second biggest chief in Basutoland" that the Chief of Leribe introduced himself to me at a drinking party early in 1964. Up to that point, I had been encouraged to think of Leshoboro of Likhoele, elder half-brother of the Paramount Chief, as entitled to make that claim.

(33) Molapo's senior son was, as mentioned above, Joseph. But he went mad, and Jonathan, his younger brother in the same house, was put in charge of him and thus emerged as head of the house of Molapo.

(34) Strictly speaking, a wholly retrospective, non-repetitive system would recognise only senior sons, the heir's brothers and uncles being at best only non-hereditary officers -- forming a kind of patrimonial bureaucracy.

(35) This is in principle the case, though there are contrary instances. For instance, there are a number of minor wards and headmanships that lie outside the Principal Wards and though they fall directly under Matsieng they are not strictly part of the Principal Chieftdom, so much as attached directly to the Paramount Chief. The Gazette is slightly misleading in this respect, tending somewhat to exaggerate the "capacity" in which a chief holds his seat. Often these villages are inhabited by non-Koena or non-Sotho groups. I lived for some time next to a so-called Xhosa village, Temeki, whose ungazetted headman, Nkopara, was ramotse to the gazetted headman Suping, directly under the Paramount Chief.

Some also maintain that the Paramount Chief has direct rights over all maboella (grazing grounds), and even that the tops of all mountains belong to him, the local chief (even a Principal Chief) being merely the Paramount's "eye". Instances quoted to me were the

(35) cont.

"mountains" of Masite (in Rothe), Qeme (in Thaba Bosiu) and Morija (in Matsieng). These are not inhabited and are essentially maboella; but they all fall within the general southern area, within Letsie I's province, and my informants were not thinking in terms of the other cardinal wards.

There are also cases where an area of alien jurisdiction exists as an enclave in another ward. Bereng Sekhonyana, Chief of Thupa-li-kaka in Rothe, has in the middle of his ward a village of Barolong people, directly under the Paramount Chief. He told me that there is another village in his area where there are individual persons and individual sites subject to another chief. Some aspects of these anomalies are more closely considered in Chapter Four below, where the institution of paballo is examined. But though such anomalies are quite common, they do not alter the correctness of the proposition stated in the context of the present discussion. The important qualification is that spelled out in the text immediately following.

(36) A good example occurs in Rothe. The recent genealogy of the house of Sekhonyana (with the wards attached to each house in brackets) is as follows:

SEKHONYANA	= (1) 'Ma-Makopoi	(No male issue)
(Principal Chief)	= (2) 'Ma-Bereng --- BERENG	--- MOHLALEFI (Principal Chief)
	= (3) 'Ma-Seshope -- SESHOPPE	(Khutlong-tse-peli)
		SANKOE (Qeme)
	= (4) 'Ma-Letsie -- LETSIE	(Ts'oeneng)
	= (5) 'Ma-mokhali-nyane	-- MOKHALINYANE --- RAMAKAU
		(Masite ha Mohloai)

A younger brother of Sekhonyana is Chief of Kolo ha Mohlalefi.

(36) cont.

The demotion of other lineages can also be illustrated from this chieftainship. Chitje Mohloai was originally headman of Ramakau's present ward. Ramakau was first sent to Chitje's to be "brought up", but was subsequently placed over him. Old Chitje's ward is now only the village of Masite Nek. Chitje, unlike Ramakau, is not a son of Moshoeshoe, nor is Moeno, another of the older (but not original) inhabitants of the village. Old Philemon Moeno, formerly headman, now has no official rank at all, though Chitje tends to consult him, especially in matters affecting the Moeno lineage. But Philemon is relatively well placed through having married his daughter to a son of Sekhonyana; the daughter of this marriage has subsequently married Ramakau.

See also Appendix II for the distribution of minor wards between the Sons of Sekake in Patlong.

(37) Sekake v. Tautona J.C. 15/59, Appendix II. Other examples occur in the disputes over the Molapo succession, and in the Regency case (Bereng v. 'Mantsebo 1926-1953 H.C.T.L.R. 50). See also the discussion of the succession to Lesaoana, note 39 to this chapter.

The order of bohali payments can complicate the issue. In the Principal Chieftainship of Thaba Bosiu, Letsie Theko appears to be the son of the "second" wife, his half-brother Sechaba being son of the first. But Letsie succeeded since bohali was paid for his mother first. But subsequent payment legitimises the offspring, and it can also be argued that a marriage is complete when bohali has been agreed.

Sechaba was discontented with his situation; and in the dispute between Mthembu and Monare (Mthembu v. Monare J.C. 272/63) discussed in Chapter Five below, Sechaba was seen giving counsel and support to the defendant, Letsie's adversary in the matter.

(38) Paramount Chief's Court, Matsieng, A Court, Book 2 of 1944, p. 419.

(39) A dispute with which the writer had personal contact illustrates both the way in which placing operates and the manner in which problems of filiation can complicate subsequent issues of succession. Early in the century, a son of Moshoeshoe's brother Makhabane came south from Mapoteng to Matelile, and was placed as Koena Chief over the existing Taung and the Taung Chief Raborabane. The Raborabane line is, typically, now represented only by an ungazetted headman, virtually a mere phala or Chief's herald, at Thabaneng.

The newly placed Chief, Sempe, was succeeded by his son, Makhabane, who was in turn succeeded by Lesaoana, who died in 1959, predeceased by his only son in his first house; Lesaoana was therefore succeeded by his heir in his second house, Sempe. But Lesaoana's own younger brother had a son, Rafael, who claimed that he had been adopted into Lesaoana's senior house to take the place of the deceased Peete.

(40) Compare the events at Rakhoeletsane, where Ntsekele was reduced to a headmanship when Tumo's son was placed over him, and to the status of a mere phala (see preceding note) when another junior son, Noko, was then given a placing (Ntsekele v. Mathealira J.C. 261/45).

(41) I was told that there was a move to have Leshoboro, the Paramount Chief's elder brother from Seeiso's third house, placed in a new Principal Ward of Mafeteng, carved out of the existing ward of Matsieng, which until very recent (post-independence) changes put an end to the system had been the personal patrimony of the Paramount Chief. In fact, however, Moshoeshoe II excised a much smaller but still far from insignificant

(41) cont.

caretaking, Likhoele, and erected this into a Principal Ward and one of the twenty-two.

(42) A misleading implication is contained in my article on Koena Chieftainship seniority (Hamnett 1965: 245), where it is suggested that Leshoboro's act in pouring soil on to the grave of Mojela of Tebang was evidence of his national seniority. This act (ho ts'ela mobu) does not have direct implications for chieftainship but refers to internal relationships within the lineage and family of the deceased. Leshoboro's mother comes from the third house of Letsie I (now the Principal Ward of Matelile) and Mojela's father was a son of the fourth house. Leshoboro poured soil in his capacity as senior father's sister's son (son of the rakhali). The Paramount Chief poured first, because of his singular position; and nobody else poured at all. This avoided any unpleasantness when it came to ranking the other members of the Letsie lineage in relation to those from the other cardinal lines. Thus, though questions of seniority entered into the matter, Leshoboro's act in pouring first after the Paramount Chief was not in itself an assertion of "circumscriptive" primacy, and the fact that he was not yet installed as Chief is irrelevant. (I am indebted to Mr Makhaola Lerotholi for correcting my mistake on this point, and also for pointing out the misleading suggestion in my reference (1965: 246) to Moiphepi Letsie of Boleka; the case of this son of a junior house of Letsie I illustrates the fact that not on even the most "circumscriptive" principle could a very junior scion of the senior segment be promoted over the heads of a cardinal line; the demographic and economic factors referred to at the foot of the previous page have no real relevance.) Sometimes a relatively unimportant person with no plausible claim at all to a senior position in

(42) cont.

the family will be invited to pour, in order to avoid the risk of quarrels over the grave. But when Rafael Sempe's mother died in 1963, the occasion was seized by Chief Sempe (see note 39 above for the persons involved) to assert his primacy by pouring earth in his capacity as head of the sons of Makhabane.

(43) This placing was in fact made, but circumstances are such that no proper assessment is presently possible.

(44) Though the Principal Chiefdom of Koeneng and Mapoteng is a partial exception even to this. Originally granted as a loan (paballo -- see Chapter Four below) to Makhabane's son Lesaoana by the Molapo Chiefs in Leribe and Butha-Buthe, it was subsequently converted into a permanent ward by the Paramount Chief (see Sheddick 1954: 141).

(45) As noted, it is also the case that in terms both of population and geographical area, more especially the latter, Letsie's house commands much more than half of Basutoland and its inhabitants. This reflects the fact that the original wards of the three first sons did not extend at first to cover the whole territory now comprised by Basutoland, and that when other areas were effectively brought within the nation (Mokhotlong, Qacha's Nek, Quthing and Mohale's Hoek) they were annexed to the Paramountcy and later in part distributed to the Sons of Letsie. Had the expansion taken place to the north-west, the subsequent history of Basutoland might well have been very different.

(46) Which is not to say that they are never advanced at all, and in exactly these forms.

NOTES TO CHAPTER II (cont)

(47) The Paramount Chief would also confirm judgments, and then, some years later, reverse the decision administratively: 'Makhoana v. Setho J.C. 188/45. Compare the historical observations in Ketisi v. Neisi J.C. 215/54, which is also an instance where such action by the Paramount Chief took place within the Molapo ward at Leribe.

(48) See also Tsikoane v. Thella J.C. 92/52, where the Paramount Chief intervened in a chieftainship dispute in Leribe. Here as frequently the Paramount acted through messengers and representatives (magosa), on the principle that legosa la morena ke morena (the messenger of a chief is a chief himself).

(49) An enthusiastic royalist admitted to me that a certain act of Letsie I, invoked as a precedent in a case at Matsieng and accepted as such by the Paramount Chief's Court, was in fact a case of Letsie's "getting away with" something in virtue of his position -- Ts'epo v. Sempe J.C. 220/45.

(50) The new constitution regards chieftainship rights as "vested" and so as justiciable before the judicial courts. Administrative action in regard to chieftainship rights is a matter for Parliament.

(51) Strictly, this applies to land allocation. Since land deprivation is regarded as involving a vested right in the landholder, it is, as such, justiciable before the judicial courts except in so far as the judgment and "discretion" of the depriving Chief are an issue. These minutiae are more important than they look and are considered at length in Chapters Five and Seven below.

(52) Motsie v. Borena J.C. 44/57 (Paramount Chief's Court). Cf. also Ntho v. Sempe J.C. 209/45; Rametse v. Peepe J.C. 261/46.

NOTES TO CHAPTER II (cont)

(53) The mixed system has implications for the rule of primogeniture as well. The practice of placing the brothers and sons of a chief does not in itself detract from the principle of primogeniture, since the senior son may still succeed his father, his brothers and uncles being so placed as not to disturb the successor's position. But in so far as placings by the Paramount Chief advance the rights of the primary cardinal line at the expense of the other three, they interfere with their primogenitural claims. The fact that primogeniture has not been fully and unambiguously institutionalized among the Sotho, operates as a justification of such interference; even today, in strict law, the heir even of a principal chief, having been presented to the Paramount Chief in terms of the Laws of Lerotholi, sec. 3 (2), is then "placed" by him in his ward, so that at least in legal theory he derives his status from such placing and not from right of birth. The maintenance of such a legal principle in effect serves to underline the national identity of the Sotho people as expressed in the Paramountcy, while its negligible political reality preserves the rights and status of the subordinate chiefs.

Moreover, the original constitutive act -- if such a description of Moshoeshoe's allocation may be permitted -- invests the concept of primogeniture itself with an ambiguity similar to that which has been detected in the principles governing chiefly seniority. Clearly, given the 'once-for-all' constitution of the cardinal lineages, the rule of primogeniture tends to operate in favour of a retrospective principle; but, equally clearly, a rule of primogeniture will tend to undermine the original fraternal allocation itself, and to favour the circum-spective principle, whereby each succeeding Paramount Chief is seen as a new Moshoeshoe in whom the processes of promotion and extrinsic seniority can repeat themselves.

(54) The circumspective principle also underlay the incorporation and subordination, by means of placings, of the non-Koena groups. Here the preponderance of political power over lineage authority is particularly apparent, though it was tempered by intermarriage and also by the granting of subordinate autonomy to certain tribal groups where this was desirable or inevitable, for example in the cases of the Khoakhoa (Makhoakhoeng), the Tlokoa (Malingoaneng), and the Taung (Taung). Other smaller groups such as the Fokeng, Phuthi and Nguni also enjoy some local autonomy at lower levels.

(55) Traditionally, as has been noted, the courts were in the hands of chiefs, and no distinction was made between judicial acts (recognising existing rights) and administrative acts (creating new rights or modifying or extinguishing former ones). It is considered in the final chapter how far this "ambiguity" in the sphere of the courts is structurally related to the other ambiguities that have been noticed here.

NOTES TO CHAPTER THREE

(1) For background material, see Ashton 1967, especially chapters 2, 10, 12-15.

(2) These senior headmen tend to be concentrated in the Paramount Chief's own ward of Matsieng, and in other wards such as Phamong that were until recently part of the Paramount's domain.

(3) Ntate and 'me are also the words used for "(my) father" and "(my) mother" respectively.

(4) The question may be asked whether there is a term for "commoner" that can be used in binary discrimination from morena, to define someone who is not a chief. The stem -fo in fact yields the word mofo (also mofohatse), which can be translated "commoner". In the plural, it is found in the name of an early political association, the Lekhotla la Bafo, or Congress of Commoners (see Halpern 1965: ch. 7), and the word occurs elsewhere. But it does not mean simply "a man who is not a chief". Just as "chief" implies a positively high status, so does "mofo" imply a positively low one, and has the connotations (in ascending order of disrepute) "subject, servant, slave". The only word that can be used without risk of offence would be motho, pl. batho, a person, as in marena le batho ba Lesotho, "chiefs and people of Basutoland" (cf. English "officers and men", "master and man").

(5) It is notable how easily the radical Basutoland Congress Party were able to reverse their previous stance of hostility to the Paramount Chief in 1965, and to put their whole political organisation behind Motlotlehi. Whatever discomfort may have been felt by some of the intellectuals, this was not generally reflected among the rank and file.

NOTES TO CHAPTER THREE (cont)

(6) A routine interchange of greetings might very well go as follows:

- A. Lumela, ntate. (Greetings, sir).
 B. Lumela, ntate, u tsohile joang? (Greetings, sir, how did you wake up?)
 A. E, ntate, kea leboha, ke tsohile hantle. Uena u sa phela na? (Ah, sir, thank you, I woke up well. And you, are you still in life?)
 B. Chee, kea phela, ke leboha ka'nete. (Oh, I am living, sir, I thank you truly)
 A. Kea leboha, ntate, sala hantle. (Thank you sir, and stay well)
 B. Ntate, kea leboha, tsamaea hantle. (Sir, I thank you, and travel well)
 A. Ntate. (Sir)
 B. Ntate. (Sir)
 A. E...
 B. E...

Such conversations can occur frequently in the course of a short walk. The field worker is well advised to resist the temptation to omit or truncate these exchanges, however much they may seem to impede his progress.

For another aspect of such exchanges, see Wallman 1969: 57.

(7) The verb ho fisa is specific to this practice and means "to lend out cattle".

For the practice of mafisa generally, see Sheddick 1954: 109 f.; Ashton 1967: 181; Duncan 1960: 81 f.; Morojele 1962: Part 2, Households and Families, pp. 29 ff., Part 7, Livestock and Poultry; Wallman 1969: 67. (Wallman is mistaken in reporting that the borrower owns the progeny, at least in Basutoland generally.) In 1960, 24.6 per cent of all holdings with cattle (which

(7) cont.

constitute about two-thirds of all holdings) contained mafisa'd stock; and about 15 per cent of cattle in Basutoland were mafisa'd (personal communication from Mr C. M.H. Morojele, 27 November 1964). The practice of mafisa is a source of difficulty in eliciting details of ownership. People do not care to admit to owning much stock and will not readily go into detail about numbers. Much information on this topic is probably unreliable.

(8) This is not to suggest that all rich men are chiefs. No doubt the richest Africans in Basutoland are the small number of successful traders, and the odd individuals who make lucky finds of diamonds in the mountain concessions. Professional and political life also provides avenues of advancement to a few (though chiefly families are well placed to take advantage of these).

(9) One incident illustrates the dilemmas of chieftainship in the modern situation. In September 1964, Mohlalefi Bereng, the Principal Chief of Rothe and Masite, banned the Congress from holding a political meeting which had been planned to take place in Rothe itself. The Congress, however, regarding the prohibition as a party-political act, ignored the ban and proceeded to Masite Nek in large numbers, from where they started to move in a procession along the road leading to Rothe. At a turning in the road, near a small wood, they were ambushed by some of Mohlalefi's people, armed with guns, and three of the Congress supporters were killed. From one point of view, Mohlalefi's prohibition was a legitimate act, not only because it could be represented as a proper exercise

(9) cont.

of the "police" functions of the chieftainship in prohibiting a possible cause of disturbance, but also and more importantly because it could be regarded not as an action structurally equivalent to and co-ordinate with an initiative by an opposing group but rather as an assertion of the chieftainship's claim to a monopoly of political right. What was being defended was the chieftainship as the unique governmental order.

Political activity could take place within it, but such activity became subversive of national institutions when it claimed to treat the chieftainship as simply another institution at the same level of structure. From the other point of view, which was also the one that received sanction from the statutes and the constitution, Mohlalefi's action in banning the Congress was an illegitimate manipulation of the "public" rights of the chieftainship which conscripted a formally "national" institution into the service of one particular group within the nation.

(10) See Hamnett 1967b: 386, where an account is also given of some of the functions of Sotho riddling, and their relationship to proverbs is discussed. For this latter point, see also Milner 1970.

(11) Some cases were noted in Chapter Two above of how chiefly authority was directly applied in the courts; see the cases of Lerotholi v. Monyoe J.C. 189/45 ("The Paramount Chief has power to cancel or confirm or add to any judgment..."), Moqa v. Moqa J.C. 206/49 (where Letsie Mots'oene of Leribe stated that "we had all powers as chief. At that time we were free to alter any judgment") and Mahase v. Borena J.C. 59/52 ("there

NOTES TO CHAPTER THREE (cont)

(11) cont.

are no limits on the orders that the administration can give").

An interesting example of how chiefs can consolidate their interests as a group is seen in Phakisi v. Borena J.C. 69/54, where the Paramount Chief's Court is alleged to have preceded its judgment by saying "We do not allow this case to go on, as it causes Chief Matlere displeasure.... He is a son of Lerotholi and so are we, and we naturally share the disappointment he has suffered in this matter...."

(12) As has been noted, the College of Chiefs lost this role in the 1965 and 1966 Constitutions.

(13) And for this, inevitably, they were rebuked by the Roman-Dutch courts on the grounds that administrative discretion cannot be delegated: Lelingoana v. P.C. J.C. 31/46. See also Tumahole Jonathan, Petnr., J.C. 58/44, and Tsikoane v. Thella J.C. 92/52.

The reliance on representatives is reflected in the (formerly universal but now much less common) practice of giving evidence through others in court. Quite often, the real witness is not present at all, and all his (or her) evidence is given by a representative, especially in the case of women and chiefs. This again provokes the wrath of the Roman-Dutch courts, where the role of the advocate is of course very carefully segregated from that of all other actors.

The standard word for a "representative" is moemeli, from ema, stand, and its applied verbal derivative emela, stand for. Moemeli is (significantly) also one of the words meaning "advocate".

NOTES TO CHAPTER THREE (cont)

(14) The constitutional development of local government is well outlined in the Report on Constitutional Reform and Chieftainship Affairs 1958, paragraphs 147-157, Jones 1951: 52-78, 147-164 (see Basutoland Constitutional Handbook, 1960). See also Pim 1935, Hailey 1953, Moore 1954 (the ill-fated Report that was virtually suppressed by the Government), Constitutional Report 1963, Halpern 1965.

(15) This does not mean that the Gazette, or the list of warrants, represented the previous situation of the chieftainship. Patrick Duncan (then Judicial Commissioner) commented as follows: "(The 1938) Legislation need not have derogated in any way from established rights; the gazette list might have been drawn up with great care on the principle that all with litokelo (rights) would be included.... That has however not been done, and from a glance at the various lists... it is clear that no consistent criterion has been followed of what is, and what is not, a chief or headman.... In Leribe possibly between a half and three-quarters of those who have in Sesuto law litokelo have been omitted from the Gazette.... A list drawn up administratively has extinguished rights which in many cases are of great material value, which are highly esteemed for the status which they confer, and which in many cases have belonged to the families in question beyond the span of human memory" (Mathealira v. Tumo J.C. 135/51). See also Jones 1951 passim for the relationship between these changes and other features of Basutoland in the 1940's, especially the outbreak of medicine (liretlo) murder. See also Chapter Two above.

For the reaction of a chief who found himself being prosecuted for holding a court without a warrant, see

NOTES TO CHAPTER THREE (cont)

(15) cont.

Ntja v. Borena J.C. 169/45: "I sat in judgment over them lawfully in the ward that was put in my charge lawfully".

The Judicial Courts were usually called "National Treasury Courts" by the Basotho, after the introduction of the Basutoland National Treasury in 1946, to the dismay of government. The term was still in common use in 1966, in spite of the abolition of the B.N.T. in 1959.

(16) During the period of research, the Basotho courts were as follows:

CENTRAL AND LOCAL COURTS

MATSIENG (4)	Matsieng Rothe Ramabanta Setleketseng
MAJA (3)	Matala Makhaleng Ralejoe
MANTSONYANE (7)	Tsapane Marakabei Lesobeng Thaba-Tseka Semonkong Senqunyane
HOLOLO BRIDGE (2)	Mopeli Makhunoane
TSIFALIMALI (6)	Leribe Pitseng Peka Manama Makokoane Tsikoane
LEJONE (4)	Motete Ntseli Lejone Bokong

(16) CENTRAL AND LOCAL COURTS (cont)

MOTJOKA (6)	Bela-Bela 'Mamathe Mapoteng Mateka Majara's Thupa-Kubu
MAKHAOLA (5)	Rannatlaila Rats'oleli Sehlabathebe Matsaile Mashai
SALANG (5)	Thabang Phahameng Makhuleng Tloha-re-bue Thaba-Nts'o
RAMOKOATSI (5)	Thabana-Morena Ramokoatsi Lifelekoaneng Thabaneng Mapotu
MESITSANENG (6)	Maphutseng Moiphepi's Thaba-Tsoeu Tsoloane Swartland Phamong
SEMPE'S (3)	Mphaki's Mount Moorosi Mokanametsong

Central Courts	12
Local Courts	<u>56</u>
TOTAL	68

Appeals lay from the Local to the Central Court.

In 1944, the office of Judicial Commissioner was created, as an appeal from the then Native Courts. The Judicial Commissioners were the principal means of imposing the new norms on the Basotho courts, a task in which they met with varying degrees of success. See also Excursus to Chapter One above.

NOTES TO CHAPTER THREE (cont)

(17) One instance would be that of a woman who persisted in walking in front of the patlello (patlelo) ea lesaka, the open space in front of the kraal. This is believed to be a danger for the cattle and will cause them to sicken and even die, especially if the woman is menstruating or if she is carrying water. The Basotho courts can treat such a matter indirectly, in that if the woman is assaulted (one woman was killed in a nearby village during the fieldwork but I was unable to learn much of significance about the case) she will be judged to have been guilty of serious provocation. The Roman-Dutch courts, of course, adopt a similar view, but differ in so far as they do not share the evaluation of the act in itself.

(18) Such is the litigious passion of the Basotho that the Basotho courts could hardly function were this not so. Even the Judicial Commissioner's court, which was at one time the fourth level of appeal (before the abolition of the Paramount Chief's appeal courts), handled anything up to six hundred cases a year. Since, as will be seen presently, there may be not one but two or even three stages before the lowest level of judicial court is reached, it would be more realistic to see the Judicial Commissioner as a fifth or sixth stage of appeal.

(19) In both criminal and civil matters, the lekhotla may also occasionally have to send the matter to the Roman-Dutch subordinate courts, or even the High Court, if a serious crime is alleged or a civil dispute outside the scope of customary law is involved. But the Basotho courts consider the question of "civil" damages in cases of murder (normally ten head of cattle).

(20) The Basotho courts encourage this belief. In Moghetsola v. Mphunyetsane J.C. 19/50, the Appeal Court at Matsieng said: "The plaintiff at Semonkong did not pass before his ward chief... as it is right and lawful to pass before him all matters pertaining to his ward, so that he can investigate them and bring them on to the appeal court/viz., the judicial court/ if necessary, as is done by all the chiefs in this country.... Therefore the case is dismissed.... If there is any complaint it must first be lodged with the chief to consider it thoroughly or pass it on".

The Clerk at Rothe Local actually refuses to open the court to people who have not been through the puso.

(21) For a trial of strength between Chitja and Ramakau, see below, Chapter Four (end), Moeno's case.

(22) At this level, the aspects of puso and tlhopho are virtually fused.

(23) There is a wide variation in appeals between districts, as an analysis of the districts of origin of appeals to the Judicial Commissioner's Court reveals:

DISTRIBUTION OF APPEALS FILED IN THE JUDICIAL COMMISSIONER'S COURT BY DISTRICT, 1953-1963.

District	% Cases	% Population*	no. of cases	Populat- ion*
Butha-Buthe	7.3	6.6	180	58,704
Leribe	23.1	15.0	581	133,379
Berea	10.9	13.6	270	121,350
Maseru	21.0	18.8	518	166,795
Mafeteng	13.2	10.9	325	97,243
Mohale's Hoek	7.1	11.6	174	102,648
Quthing	4.4	8.8	108	78,037
Qacha's Nek	4.4	7.8	109	69,118
Mokhotlong	8.4	6.9	204	60,804
TOTAL	99.8	100.0	2469	888,258

(23) cont.

It will be noticed that Mohale's Hoek, Quthing and Qacha's Nek have a lower proportion of appeals than their population would suggest, while Leribe has a higher one. These relationships are borne out in a sample of 304 cases over the period 1944-1964:

DISTRIBUTION OF 304 APPEALS FILED IN THE JUDICIAL COMMISSIONER'S COURT BY DISTRICT, 1944-1964.

District	% Cases	% Population*	no. of cases
Butha-Buthe	7.3	6.6	22
Leribe	24.2	15.0	74
Berea	14.5	13.6	44
Maseru	22.5	18.8	69
Mafeteng	12.1	10.9	37
Mohale's Hoek	8.0	11.6	24
Quthing	4.7	4.7	14
Qacha's Nek	1.7	7.8	5
Mokhotlong	5.0	6.9	15
TOTAL	100.0	100.0	304

* Population figures are taken from Morojele 1962: Part 2, p.11. Though the figures are held constant throughout the periods covered by both tables, there is no reason to suppose that internal migration took place on a scale that would significantly distort the results. In any case, no other at all reliable figures are available.

It would, of course, be a matter for further and specific research to determine whether and to what extent these variations are related to the conscientiousness of chiefs, and how far this in its turn is related to the remoteness of certain areas from the urban and semi-urban centres of population. This

NOTES TO CHAPTER THREE (cont)

(23) cont.

last hypothesis gains some support from the low figures for Qacha's Nek, but is contradicted by the high one for Mokhotlong. Of the two, Mokhotlong is the more inaccessible from centres of "modern" life.

NOTES TO CHAPTER FOUR

(1) But litigants may, nonetheless, invoke the Paramountcy if it seems in their interest. Thus, in Lesia v. Oliphant J.C. 142/64, the appellant, who had taken over his parents' land without allocation, stated, "I will not defend in a case concerning the soil. The soil is a prerogative of the Paramount Chief and I have nothing to say; it is the Paramount Chief who has the right to allocate the soil".

(2) It might seem that it would be appropriate to invoke the distinction between "sovereignty" and "ownership" rather than between "administrative" and "usufructuary". But there are two objections to this. First, "ownership" is, as will become very clear, precisely what landholders do not enjoy. Secondly, during the colonial period, "sovereignty" was vested in the Crown, so that ultimate political rights could not inhere in the Paramount Chief. Hence the notion of "ownership" was invoked to cover the position of the land.

(3) Chiefs are suspended and replaced by acting chiefs on grounds of senility, madness, extreme and continued incompetence, or outrageous ill behaviour. But Mohlalefi Bereng, after being released from prison after conviction on an extremely serious charge arising out of the political killings at Rothe in 1964, returned to his position as Principal Chief.

(4) In 1967 and after Chief Leabua Jonathan attempted to legitimise and legalise his position vis-a-vis the King by bringing pressure on him to sign an agreement that certain actions on the King's part, as evaluated by the Prime Minister, would constitute abdication ipso facto. Chief Jonathan relied, in this action,

(4) cont.

on the support of the College of Chiefs which, though shorn of the powers it enjoyed under the 1959 Constitution, retained a special position in regard to the Paramountcy -- though it is another question whether this special position extended so far as to cover the Prime Minister's intentions in the matter.

(5) Mohalefi Bereng of Rothe has chieftainship fields at most of his many titular wards. One is a large field which is now, in fact, within the Principal Ward of Matsieng in Thaba-Chitja, opposite Masite Nek on the other side of the Maseru-Mafeteng road. Some of this is now cultivated by the subjects of Thaba-Chitja, and a large part of it is share-cropped by Mahlaku, the zealous entrepreneur who runs a shop and beer-hall in Masite Nek and who was mentioned in "A Case of Night-Grazing" above. But it was difficult to find out which of the many lands that Mohalefi was criticised for not allocating to his subjects but continuing to use or share-crop for himself were actually masimo a lira and which were lands that he had allocated to himself -- or, indeed, simply lands that had not been allocated at all.

(6) The word comes from ho boya, to return, come back, the perfective derivative of which is ho boella, meaning to return to the beginning, to return again and again. The more general sense of leboella is thus (as given by Mabilile and Dieterlen 1961: 42) "provisions kept for another occasion".

(7) About 36 per cent of all stock-holdings send cattle to the cattleposts (personal communication from Mr C.M.H. Morojele).

NOTES TO CHAPTER FOUR (cont)

(8) The current system is laid down by the Paramount Chief's Order in Laws of Lerotholi Part III 13.

(Part II 11 refers to leboella in the wider sense.)

(9) The Paramount Chief is said to have three kinds of cattle-post (mothebo), one for his own cattle, one for the people of Matsieng, and one that is open to all Basotho.

(10) From baballa, to take care of. Paballo (pl. lipaballo) means "care", "safeguarding", rather than "loan".

(11) But in Letima v. Peete J.C. 54/66, the Central (Basotho) Court took the view that "paballo exists when chiefs or headmen are not under the rule of each other", i.e., only between coordinate jurisdictions. This in effect means that if a headman is required to grant an area to his superior, he simply forfeits it.

(12) It will be clear that the elimination of lipaballo does not mean the confirmation of the status quo, but rather the opposite; the original jurisdiction is revived, and landholders must choose between their lands or their chief. Every elimination therefore involves the risk of a new dispute. Subjects are aggrieved if they have to leave their lands, chiefs if they have to lose their people.

(13) For the word lesafo and this proverb, see Hamnett 1967: 390 n.3.

(14) "Interploughing" is also used of a paballo ea mpa.

(15) See the judgment of 'Mamathe's court in Mafeka v. Libetoe J.C. 74/56, where it was stated that "chieftain-ess 'Mamathe never goes to allocate lands in the area

NOTES TO CHAPTER FOUR (cont)

(15) cont.

of Mosongoa (Thakampholo's -- a minor chiefdom, not a headmanship), but rather she goes to make a request". Of course, a request from a Principal Chief is not lightly refused.

(16) Thus the Paramount Chief's Court in Matjeketjela v. Theko J.C. 19/47: "I order you to give Matjeketjela a land".

(17) The term "area" refers to a unit of administration (sebaka), "land" or "field" to a unit of usufruct (ts'imo). Precisely one of the doubts in this case is the question of which was involved.

(18) R.F. Thompson, Judicial Commissioner, was probably right to remark that "the elimination of lipaballo is affecting the rights of thousands and thousands of people... and it is a delicate matter which is not very apt for solution in courts" (Mofoka v. Moshoeshoe J.C. 128/60).

(19) In fact, the rule as written had the unintended effect of compelling Principal Chiefs to eliminate lipaballo in respect of their own headmen, which was not what was expected. Legislation to correct this was imminent. See Theoha v. Lebajoa J.C. 143/64, including Paramount Chief's administrative decision of 19 December 1958. In this case, Makhabane Peete, Chief of Koeneng and Mapoteng, claimed that as the whole of the chiefdom was his ward, he could not be subject to paballo within it, and that any of his subjects directly under his jurisdiction were unaffected by the law eliminating lipaballo. The Paramount Chief supported this view. But the Basotho courts did not accept that a Principal Chief was in a special position, and required

NOTES TO CHAPTER FOUR (cont)

(19) cont.

his direct subjects to bring their allegiance into line with their land-holding, though they were free to decide which to retain and which to adjust. But the view that a Principal Chief cannot be baballosa'd probably represents the traditional law. The position here was somewhat complicated by the fact that the headman who had ruled the area in question had died, and Chief Makhabane, instead of appointing his son, had retained the ward in his own hands. The jurisdiction thus existed, but the vacancy was unfilled. The Paramount Chief took the view that "the ward chief may spread out to any extent within his ward".

(20) In addition to the cases that follow, I have records of a case against his ward chief before the Paramount Chief's administrative court in 1950, a dispute against Chief Molikuoa Lejaha before the College of Chiefs in 1960, and an administrative case against Lihoapa before the Chief of Koeneng in 1963. No doubt there were many others.

(21) The Judicial Commissioner reversed the Central Court, partly on the grounds that Ramakau's allocation had taken place first, partly on the grounds that at the relevant time neither Ramakau nor Chitja were proclaimed, so that the only officially recognised authority was that of the Chief of Rothe itself.

NOTES TO CHAPTER FIVE

- (1) Strictly, this means "married".
- (2) This general and unspecific claim to a share in the land resources of the nation has been called the "right of avail" by Hughes (Hughes 1964).
- (3) This obligation must, of course, be read subject to the qualifications discussed under paballo in the preceding chapter.
- (4) The obverse face of this liability is that a subject could withdraw from his allegiance and transfer himself to another chief. There was a time when this was an effective sanction, since a chief needs subjects. When Basutoland was being opened up and new jurisdictions created through the placing of chiefs, subjects were in a position to exercise a real choice. This is much less true now, even though chiefs' salaries are linked to the number of tax-payers in their wards, since expansion has virtually halted, few "vacancies" exist, and land is competed for. A chief without subjects was known as morena-'mele, "the chief of his body". Compare also the proverb phakoe e ja ka balisa, "the hawk relies on the herdsmen for his food".
- (5) However, at Masite, Chief Ramakau and his headman Chitja have an arrangement whereby each other's subjects can live in either village without being regarded as "turning the door".
- (6) It is notorious that many Basotho spend the greater part of each year, or even years together with only short breaks, as migrant labourers working in the Republic of South Africa, notably in the mines and factories of the Witwatersrand. The exact number is

(6) cont.

not certain, but the proportion of young and young-middle-aged males who are more or less permanently out of the country is very large. Something in the order of two-fifths of adult males have been estimated to fall into this category, and probably between a half and two-thirds of all males in their twenties. These wage-earners remit much of their earnings to their dependants in Basutoland, whose economy indeed depends importantly on this resource. But the migrants have, of course, no rights in the Republic, and after some years away they virtually all return home -- as, indeed, they must do when they cease to be acceptable as labourers. Their wives and children remain at home, to tend the fields and even to plough them if the men do not (as they usually do) come back in the spring to do this work. In any case, permits are normally issued only for single labourers, not for wives or dependants. The family lands thus represent a form of ultimate security -- and in most cases, the need is fairly immediate -- and migrants are always anxious to retain their allegiance to their home chief, which they do by making a point of paying their taxes to him and returning home for holidays and visits on occasions. Basotho who leave the country areas to chance their arm at employment in Maseru or other urban centres in Basutoland are equally anxious not to forfeit whatever claims they have in their home areas, though some have left the land because there was so little hope for them from it. Even civil servants and professional men are keen to retain their lands, and often leave a junior brother or other kinsmen in the village to keep their rights in active exercise. The general pattern of migrant labourers retaining an eventual security when their wage employment ends is familiar enough to need

(6) cont.

no documentation. It is the scale rather than the pattern which is so special a feature of Basutoland's economy.

(7) This observation is more controversial than it looks. Discussion is remitted to the excursus to this chapter, "Land Shortage in Basutoland", below.

(8) A small footnote to Dr Wallman's article may be added. In 1966, I was helping 'Ma-Pula, the manageress of a small South African-owned store near Mafeteng, to weigh and pay for small bundles of corn which women from the nearby village were bringing in to sell. 'Ma-Pula examined the quality of the corn, as she was instructed to do, and took great care to weigh it very precisely on the scale provided by the company. But she took no account of the containers in which people brought the corn to the store; one woman brought a few pounds in a cloth and was paid exactly; the next brought hers in a heavy metal pail, and she was paid for the weight of the pail as well as the corn inside it.

But the discussion in the annex to this chapter suggests that, in the round, the apparently irrational measurement practices of the Basotho may be more valid than they look. Field size and field numbers do not vary independently on a statistical level. An individual may be foolish to gauge his fields by numbers, or to measure them along only one dimension, but some of his perceptions turn out to be uncannily close to the truth.

(9) See Morojele 1962, especially Part 2, pp. 33 ff., from which the following table is adapted:

(9) cont.

Holdings with	<u>Holdings with given number of fields by zones</u>					Total
	%	%	%	%	%	
	Border	Lowland	Foothill	Mountain	Orange Valley	
0 field	1.8	4.9	4.1	3.0	3.7	3.7
1 "	15.8	27.5	17.6	16.9	12.5	19.5
2 fields	30.8	35.9	39.7	32.9	40.9	35.8
3 "	33.3	23.8	25.9	27.4	24.0	26.3
4 "	12.7	5.7	9.1	11.2	9.8	9.2
5 & over	5.6	2.2	3.6	8.6	9.0	5.5
	100.0	100.0	100.0	100.0	100.0	100.0

The total number of holdings is taken as 161,250, and that of fields (lands) as 388,657. Note that in the above table, holdings with stock but without lands are included.

(10) The obviously vital question of acreage is discussed in the excursus, since it does not enter so directly into Sotho consciousness. Though the economic yield is a factor of which people are aware, they conceptualise any shortfall in terms of "not having enough lands" rather than "not having enough land".

(11) Personal communication from H.M. Moshoeshoe II, June 1970.

(12) Some people say that one land is for tax, one is for the "house" and one is for the children. Since tax liability starts at 21, this view founds a claim that bachelors are now entitled to at least one field.

(13) It will be recalled that in the paballo ea mpa, the donor generally retains grazing rights -- perhaps the clearest case of the separation of the two production

NOTES TO CHAPTER FIVE (cont)

(13) cont.

units, since the identities of the entitled individuals are distinct.

(14) On both cooperation and share-cropping, see Morojele 1962: Part 5 and Wallman 1969: 50 ff. No attempt is made here to treat these topics systematically; only those aspects that have a bearing on the legal implications of usufructuary titles are considered.

(15) The sum is less than 100, since 5 per cent of cases are unclassifiable in these terms. These figures are taken from Morojele 1962: Part 5, Table 26. In so far as it was possible to arrive at an estimate, the situation at Masite Nek is consistent with the Census extrapolations. Of 36 cases about which relevant information was available, about 13 appeared to involve what has been categorised as an "exploitative" relationship, the remainder being cases of cooperating with kin or friends or not requiring help at all. These 36 cases represent about half of the households, if landless families and temporarily vacant sites are included.

(16) It should be borne in mind that where labour is directly hired, any exploitation involved is in the opposite sense. A wage-labourer will find it very difficult to acquire lands himself. He is unlikely to be able to afford to marry, and may not have a residential title within the ward, or even owe allegiance to the same chief.

It is also important to add the caution that a relationship may be potentially exploitative, in that its structure is compatible with exploitation, without actually being so. It would be dangerous to assume that one-third of all holdings had fallen into entrepren-

(16) cont.

entire control. Rather, it is remarkable that, in a society characterised by such general poverty, where even a small absolute economic advantage can give its possessor the means to use it for further advance, entrepreneurial control of land resources is not more widespread than it is. The basic reason for this is probably that land is not a good investment in Basutoland, so that people use their skills and capital to build up interests elsewhere; they may then use any spill-over from this to acquire de facto land rights, or they may contract entrepreneurial arrangements in order to acquire the initial capital. But in neither case does the successful entrepreneur usually regard land as in itself the principal object of his activity. There is a small group (0.4 per cent of holdings) of "progressive farmers" in Basutoland, a few of whom have relatively highly capitalised "farms". But there is no evidence to link these systematically with rural entrepreneurs.

(17) Cf. Paramount Chief's Court in Manyeli v. Brand J.C. 168/45, "I find that these are lands of removers, your father and mother being dead".

(18) Several proverbs describe a man who runs after two chiefs: lemao le ntlhapeli (a needle with two points), ke motjoli o tono se sephatsoa (a wagtail with a black and white tail), o ja ka mehlahare e 'meli (he eats with both jaws).

(19) Special problems are raised for customary law by the mortmain created in the case of perpetual corporations, especially when, as with the University of Botswana, Lesotho and Swaziland at Roma, they hold title outside

(19) cont.

the government reserves and furthermore need to encroach on arable land. This topic will not be further explored (v. Sheddick 1954: 134-136).

(20) Housing at Roma for the academic and administrative staff was deliberately not built to provide accommodation for servants, since the assumptions underlying such provision were disapproved by "liberal" sentiment. In the case of white staff, this means that servants have to walk to and from their place of work every day (the local community would resent it if the University and its staff did not provide employment when they are known to be able to afford it), while black lecturers and administrators find their houses filled up by kinsfolk of all ages (often unpaid servants in all but name), who have to live and sleep in places around the house that are actually worse than servants' accommodation would be.

(21) People who acknowledge the greater cheapness and better insulating qualities of thatched roofs often prefer to use corrugated iron. This is partly because it is culturally preferred, being more modern and "smarter", but also because it reduces fire risk, accidental or malicious. While I was in Masite Nek, a woman deliberately burned down her mother-in-law's hut, even though both women lived in it together.

(22) In the interests of the agricultural economy, the higher courts have also permitted a wrongful occupier to reap where he has sown. While this may be better than ploughing the crops in, as traditional practice allowed, it can be said to put a premium on wrongful occupation of lands.

(23) Throughout this section, it should be remembered that Basotho do not, as a rule, attach much importance to particular parcels of land affectively or culturally. Their attitude to ts'imo is basically instrumental, and a man who can exchange a poor land for a good one would not be likely to hesitate out of any attachment to "his father's lands". The stress on the "family lands" is a practical one. In principle, what a man wants is land, and if his father has died, the obvious course is to apply to have the same lands confirmed on himself, but if other lands are offered instead, then other things being equal they will be acceptable. The particular identity of a given land-parcel also has evidential importance, since it is usually easier to support a claim if it can be shown that a land has been "in the family" for some years and ploughed by a certain person. Consequently, considerable importance is attached to particular land-parcels, but the reason for this should not be misunderstood. It is otherwise with residential sites, to which there is considerable attachment. One sign of this is the fact that when a site changes hands, usually after a death, the new owner fears persecution at the hands of the dead man's lineage. The former owner will have, or will be thought to have, hidden medicines under the hut which will be dangerous for any new occupier from a different lineage. The new owner will usually destroy the hut and build a new one. Similarly, when a man alienates a site, he opens himself to supernatural reprisals from his own ancestors; and if on marriage he moves to his wife's place, he will be nervous about supernatural dangers unless some months pass with no untoward accidents. Medicines are also used on land, but this is to protect the fertility of the soil against possible magic or witchcraft from a

(23) cont.

neighbour. If a man suspects that his neighbour is causing damage to his land by supernatural means, he will mix up some earth from both fields and scatter it, thus throwing the evil influences off the scent.

It was the traditional practice not to continue to use a hut after a death, but this is less common now, especially when durable structures are built that it would be far too wasteful to abandon or destroy, cf. note 26 below.

(24) For a further reference to this notion of decisions being lawful but not therefore constrained, see Chapter Six, note 38 and Chapter Seven, where the philosophical and epistemological basis for this view of "action" is made more explicit.

(25) Cf. Duncan 1960: 67-69, 95-99; Sheddick 1954: 70-71, 78-80, 125-6.

(26) It will be obvious that great difficulties have been created for customary law by the existence of durable, immovable and expensive structures in modern times. Traditionally, a remover could take what he provided himself, but had to leave whatever he had acquired from the communal liremo -- including the walls of the hut, if they were made from mud or clay, and not of bricks purchased by the occupier.

(27) In the 1946 edition, sec.7 (7) read "continue to dwell thereon or in the immediate vicinity". The last five words were removed in 1959.

NOTES TO CHAPTER SIX

- (1) The stem is -fa, meaning "give, bestow". It should not be connected with the word lefa, stem lef-, meaning to pay (of a fine or debt).
- (2) 1873 Report, December 3rd 1872 paragraph 21. It is important to notice that the quotation from this Report contained in Duncan 1960: 11 contains a misprint. As the Judicial Commissioner observed in Khatala J.C. 70/61, the word "and" in the last sentence should read "who". This error virtually reverses the sense of the passage.
- (3) Viz., bohali.
- (4) The mother's brother. The malome has a claim on a part of the bohali paid in respect of sister's daughter, on the assumption and provided that he made appropriate contributions to her well-being, especially at the time of her initiation and marriage, or helped towards the bohali payable in respect of her brothers. This right of the malome is called lits'oa. Cf. Laws of Lerotholi (1922) Law 20; (1946), (1955) and (1959) sec. 5.
- (5) The language of the second and third of these brocards, like that of so many proverbs and sayings, has the abridged and elliptical quality of traditional poetry and praise-songs.
- The word "house" is translated by both ntlo and lelapa.
- (6) I am thinking largely of the bewilderment of the official courts and the clumsiness which they have so often displayed in this area -- albeit with the best of intentions. But the puzzlement is also apparent in the treatment this tract of law has received outside the courts and away from the bench: cf. Duncan 1960; Ramolefe 1969.

(7) Continental jurists, with their experience of codes and their undogmatic approach to la jurisprudence, are better equipped for the understanding of customary law (paradoxically enough) than are English and South African lawyers (notwithstanding the civilian roots of Roman-Dutch law in the latter case) with their case-law orientation. The word "customary" itself, of course, has confused most common-lawyers (as is argued in Chapter One); but it is also apparent that the procedure of customary law is not nearly so close to that of case-law as it is to a system of jurisprudence with, as it were, an "implicit code".

(8) There is no exact translation of the word "own", especially in relation to the difference between "own" and "possess". "To have" is ho ba le, formed from the copulative verb ("to be") with the addition of the conjunctive le (with). "I have a cow" is ke na le khomo, but there is no definite implication of "ownership". The word rua means "own" or "possess", but with the connotation of being rich, owning much (cf. English "landowner"). The nearest word for "owner" is mong (plural beng), but this too has the implication of mastery or lordship rather than simple ownership. The word mong is also used in senses where the word "owner" would not be used in English, e.g., in describing a husband and wife as "owners" of a marriage, or of a case (nyeoe).

(9) My own conviction is that if alien concepts of law are to be applied at all, then all individual rights in a deceased's estate should be regarded as iura in personam, and the quest for a determinate titular of rights in rem should be abandoned at this level of analysis. But ultimately, no doubt, a meta-language of comparative jurisprudence is the only answer: see Vanderlinden 1966 and 1969.

(10) Manyebutse J.C. 49/44 (judgment of Paramount Chief's Court). (Note the Salomonic touch).

(11) 'Matsoana J.C. 85/45. This was a family dispute not involving inheritance, but the principle at issue is the same. It is of passing interest to note that though the court's address was headed "Kahlolo" (judgment), it ended with the words "ena ke eona khaolo", the term khaolo usually being used of an administrative "decision", in contemporary language. Cf. the more "sophisticated" statement of the Paramount Chief's administrative court in Phatela v. Mapote J.C. 163/49: "this is not a judgment (kahlolo), it is a decision (khaolo)". For similar actions by the chief's courts, see Rakoboso v. Nkaka J.C. 49/51 and many others.

(12) The role of the makhotla a tlhopho and a puso is described in Chapter Three.

(13) In the house of Rantsilonyane in Masite Nek, the senior son was Pheello, now dead, who had two wives. The son of the senior house left with his mother and married, taking cattle from his mother's place and without informing his father or asking his help. Pheello then settled with his second wife at Masite Nek, and had two sons before he died. The son of the senior house, who has now moved back to a village nearby (Thaba-Chitja), then claimed a share of his father's cattle. Pheello's brothers resisted this claim; but the second widow declared herself content with the share, provided the son came to live with her and her own sons. However, he is evidently interested only in the cattle, and is acting under pressure from his mother, from whose father's kraal his bohali had, as seen, been provided. Ramakau, chief of Masite (Mohloai), and Chitje, headman at Masite Nek, appointed a phala to hear the case; but

(13) cont.

the dispute was not settled, and in 1966 was due to proceed to Mohalefi's lekhotla la puso at Rothe.

(14) The stem -ja means "eat", in its primary sense. It also means "consume, take over, enter into", as in the word mojalefa, heir - "the one who 'eats' the inheritance". But it is also widely used as meaning "despoil, impoverish, take away the rights or property of", and in this sense can be translated "eat up". (The form jane is the negative conjugation of the reciprocal derivative - "each other"; cf. Doke and Mofokeng 1957).

(15) Polygamy (sethepu) is comparatively uncommon today. Using data from the 1956 Census, it can be calculated that only about 4% of males and 7% of females were partners in polygamous marriage. In most of these marriages, there were only two wives. Since most of these were of the older generation and many will have since died, these figures should probably be reduced today. Nevertheless, the question of "houses" remains of great importance. (1) Many contemporary disputes about both property and succession refer back to a period or periods in the past (and often the fairly recent past) when polygamy was common. (2) Chiefs have traditionally been polygamous, and it is above all in the chieftainship that many crucial issues of ranking and seniority arise, with consequences reaching out beyond the successors and affecting the junior sons of junior sons, who have now been extruded from chieftainship. (3) Customary law marriages are still (it can be argued) polygamous, though it may be a case of "polygamy with one wife". The law that applies to customary succession, filiation and inheritance is a law that reflects a polygamous society. (4) Basotho often

(15) cont.

apply categories derived from polygamy to situations which might not be so regarded in modern courts. For instance, when a man remarries after divorce, or after the death of his wife, the rules applying to malapa are often applied. The same is sometimes true even when a man simply takes a mistress and has children by her. In these senses, polygamy is much commoner than it looks.

(16) See Ramolefe, n.d., contra Duncan 1960: 19. The difficulty arises that when Griffith took a second daughter from Nkuebe to replace Sebueng (Sebueng having in fact born Seeiso, and having returned home, not died), this incident can be as easily regarded as an example of how a Paramount Chief can "get away with" behaviour that would not be tolerated in ordinary people; moreover, Griffith paid no cattle for the seantlo.

(17) Lit., "one who goes to the house".

(18) So the Paramount Chief's Court in Khabele J.C. 319/48.

(19) Malofotsane v. Mpho J.C. 1959/107.

(20) See the story of Moshoeshoe, Letsie I and Senate in Chapter Two, and Jones 1966: 70-71. The cause célèbre of Sekake v. Tautona J.C. 15/59 (see Appendix II) illustrates all and more than all of the points referred to here.

It will be seen that the question of the order in which wives are ranked is far less simple than is suggested in Laws of Lerotholi (II) (1) or 13 (1) above.

(21) Cf. the saying monyala ka peli o nyala oa hae - "he who marries with two (sc. beasts) gets his wife just the same".

(22) E.g., in the case of Philemon, Ramakau and Mohlalefi referred to in Chapter Two, note 36, Sekhonyana's house had received cattle from Philemon for the marriage of his son Moeno, and had given cattle to Moeno when the latter's daughter married Ramakau: Khomo li boela hae, "the cattle return home". Mohlalefi now suggests that the daughter of Ramakau from this marriage should be brought up by Mohlalefi and marry one of his sons, with a reduction in the bohali payable. See also Leshoboro's marriage to his cross-cousin Mosa, and Khethisa's contribution of ten beasts (Appendix III, sec. 4). It may be added that the order in which bohali was paid can also be an issue. Mention has already been made of the chieftainship of Thaba Bosiu, where the rival claimant argues that since bohali was paid for his mother first, he has the title to succeed (Chapter Two note 37).

(23) One further point, particularly relevant in modern times when monogamy is vastly commoner, is whether a subsequent marriage after death or divorce is to count as a second house or not. The point arose in Lephole J.C. 15/58, Ntoula v. Morake J.C. 227/60, Mojake v. Litjamela J.C. 4/63. The Basotho courts were undecided. Of course, the same issue can arise in the traditional context, where it is a doubt whether the second marriage was designed to replace the first.

(24) On this, see Basotho courts in Molapo v. Mahoona 1926-1953 H.C.T.L.R. 309. A widow remains married to her husband's family unless she divorces them and restores the cattle.

(25) The case was decided in favour of Letsie, but since it was one that originated in the High Court, neither this outcome nor the grounds for it are of direct relevance to this study.

NOTES TO CHAPTER SIX (cont)

(26) At Thabana-Morena, in the case of Leluma v. Mojela, the Basotho court held that "the rights of a widow after her husband's death do not multiply or decrease; she lives as she lived during his lifetime" (J.C. 184/64, C.C. 183/63).

(27) One area of disagreement concerns whether a widow can "open the court", i.e., sue, in her own name. This is a rather unrewarding discussion at this level, and will be considered only in so far as it bears on the widow's relationship to her husband's agnates.

(28) In Motsiri v. Lintlholoane J.C. 79/65, the effect was that the widow could not prevent the heir from discharging the deceased's debts. This is a case where the heir was described as "not having eaten the estate", i.e., where the mo-ja-lefa did not ho ja the lefa. This seeming contradiction in fact reveals a fairly simple state of affairs.

(29) In Roman law, usus fructus is, of course, a real and not merely a personal right, so in relying upon the concept of usufruct the court is not necessarily setting up a distinction between real and personal, as it is in the terms of owner and tenant. For limited purposes, the notion of usufruct is not in fact inappropriate, but it runs into difficulties all the same, since it implies a distinction between the res and its usus and fructus which breaks down in the Sesotho case. The "capital" of the estate is not untouchable. Besides, it seems preferable, if such terms must be used at all, to regard all individual rights as being in personam, rather than as all in rem.

(30) The main line of cases is Makupu J.C. 89/55, Ralienyane v. Lekaota J.C. 11/62, Seisa J.C. 80/62 and Khatala J.C. 70/61. (The Appeal Court judgment in

(30) cont.

Khatala is reported in Journal of African Law, Volume 10 no. 3, Autumn 1966, pp. 173-177.) It must unfortunately be stated that Ramolefe's discussion of the issues is both confused and inaccurate (Ramolefe 1969).

Khatala married 'Ma-Tatela and had a son, Molungoa. 'Ma-Tatela died, and Khatala married Francina, who bore no issue. Two of the Basotho courts relied on Laws of Lerotholi 11 (1) and found for Molungoa. The third (Maja's A) took the view that Molungoa could not have ousted 'Ma-Tatela, and that since Francina had come into (kenela) all her predecessor's right, he could not oust her either. In taking this line, the court rather bizarrely founded on the well-known case of 'Ma-Dyke (Lesitsi v. Mafa J.C. 84/53), which is discussed in the preceding chapter and which, of course, is concerned with a very different set of issues in its own terms: though Maja's were nevertheless operating on a relevant basis in attending to the rights of the widow, while transferring the argument from land to lefa.

(31) There is, moreover, a case for the view that the debate has been falsified by the assumption that Sesotho marriage is monogamous where there is only one wife (one wife at a time, in Khatala's case). It has already been suggested that this is not so. It is rather a question of a polygamous marriage with only one wife.

(32) In Sesotho, karolo e kholo, which can mean simply a major part. Notions of strict accounting hardly apply.

(33) In Laws of Lerotholi 14 (3), the clause "other than the house from which the principal heir comes" is misleading. The principal heir's house is not excluded from the law as related here; the meaning of "other than"

(33) cont.

(ntle ho) is to direct attention to junior houses, one class of which (those lacking male issue) have been dealt with in 14 (2), the class with male issue being considered in 14 (3).

(34) See the argument of Ezekias in Labane v. Lichaba J.C. 334/49, Chapter Two note 31 above, and the reference there to Makhaola's case, J.C. 182/64. Cf. also Lichaba v. Lekata J.C. 7/44 where Lefokoloi was described by the Paramount Chief's Court as the "husband" of his paternal grandmother, his father and his father's father both being dead. See also remarks in Ramolefe 1969.

(35) Compare the foregoing discussion of "allocation" where there is only one house.

(36) The issue between malapa strictly concerns the houses set up by the different marriages of one man. But the principles that apply between full brothers are, as seen, very similar; this is especially true after the first generation has passed, the same protective rules applying to parallel cousins inter se as apply between brothers of different houses in the narrower sense (see the case of Mojake v. Litjamela, discussed below). It will be recalled that Letsie, Molapo, Masopha and Majara were all full brothers - sons in Moshoeshoe's first house.

Full brothers, half-brothers and parallel cousins are all bana ba motho in Sesotho terminology, and address each other as ngoaneso (see Appendix I, sec. 1).

(37) Other cases include Mokhesi J.C. 230/45, 'Moleli v. Maisa J.C. 286/60, Moseli J.C. 125/64.

(38) To be able to give a reason is not to postulate an efficient cause. The view of reasoned decision adopted here follows the thesis in Louch 1966 (and compare Winch 1958), and is amplified in a judicial context in Stone 1964. What is implied in denying that a decision is "constrained" is the repudiation of what Sawyer calls the myth of "decision-inevitability" (Sawyer 1965: 105, and see note 1 to Chapter Seven below). However, it must be stressed that what is involved in this approach is not that there are a series of bounding rules which define areas of free "discretion". To suggest that this is the case is to imply "decision-inevitability" in regard to the rules and disorderly choice in their interstices, which is precisely the view that it is here being attacked. The argument is developed in Chapter One above, and explicitly related to Sotho law in Chapter Seven.

(39) Strictly speaking, under the 1965 and Independence Constitutions, succession to the Paramountcy is recommended by the College of Chiefs, which contains all the Principal and Ward Chiefs, whether or not they are members of the Koena lineage.

(40) On the malome relationship, see also note 4 to this chapter, and Appendix I sec. 4.

(41) Like the malome, the rakhali (father's sister) also plays an important role in the life of a child of a family, more especially in the earlier years, and she may well also be given a voice in the formal council of the lelapa. But the personal relationship between the heir and his mother's brother or father's sister is analytically separate from the roles performed in the assembly of the lelapa.

(1) Jerome Frank quotes from Abbott's Justice and the Modern Law as follows: "The judicial process in ascertaining or applying the law is essentially similar to the process by which we acquire our knowledge of geometry.... In the great majority of cases the solution of (legal problems) is as certain and exact as an answer to a problem in mathematics" (Frank 1949: 8). W. Blackstone writes that the judge "is not delegated to pronounce a new law, but to maintain and expound the old one". Even where a decision is "most evidently contrary to reason" or divine law, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.... It is declared, not that such a sentence was bad law, but that it was not law.... Our lawyers... with justice... tell us, that the law is the perfection of reason.... Not that the particular reason of every rule of law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason...." (Blackstone 1783: Book I, Introduction, Section 3, pp. 68-71).

The myth is described by Sawyer as being one of "decision inevitability" (Sawyer 1965: 105). Frank (1949) analyses it as involving a notion of law as a logical plenum, and in expounding the view he is concerned to attack he writes that according to this myth, "law is a complete body of rules existing from time immemorial and unchangeable.... The law, ready-made, pre-exists the judicial decision. Judges are simply 'living oracles' of law. They are merely 'speaking law'...." (It may be recalled that Coke referred to judges as lex loquens.)

Certain time-honoured phrases used by advocates in addressing the Court of Session in Scotland are

NOTES TO CHAPTER SEVEN (cont)

(1) cont.

redolent of parts of this myth: "If your Lordship so finds the law...", "... the words that have fallen from your Lordship's mouth...."

(2) It is hardly appropriate to develop all the implications of these assertions here. The point concerning authority as a basis rather than a kind of power has been well expressed by Parsons (1960) and admirably glossed by Giddens (1968). One particular source of confusion in Smith's approach is that if authority is seen as a special case of power, the opposition should (correctly) be between two kinds of power, viz., that with and that without authority; but though the analysis may start from that point, it all too easily shifts into opposing power on the one hand to authority on the other, which in the original terms is to contrast two different levels of structure. The whole and the part are treated as co-ordinate. Again, if authority is regarded as legitimate power, there is no easy answer to the question of the source of non-legitimate power: this cannot always be, or at least cannot remain, simply force or self-interest.

The second assertion (that Smith's scheme leads to erroneous conclusions about actual processes) is one of the cardinal themes of the argument in this chapter and will be developed at length below. Briefly, it leads to a polarisation of "discretion" on the one hand and "rule-governedness" on the other, which though a fair reflection of the conceptual set of "declaratory" legal systems, distorts the reality of what will be characterised as "executive" law.

In fairness, it must be conceded that Smith's scheme is professedly analytical, and that he is careful to repudiate any temptation to reify the concepts which

(2) cont.

he employs. Indeed, his earlier application of the same general framework to the Nuer (Smith 1956 passim) shows clearly that the terms he employs are in principle universal in intention. In fact, it is the clarity and simplicity of his theoretical apparatus that have led to its adoption here; but the hazards it conceals demand that it should be treated precisely as a starting-point and not as a resting-place.

(3) Popper's sketch of a wholly "abstract" society has many features in common with a wholly "administrative" one (Popper 1962: 174-5); but a better example for the present purpose is that of the "musical banks" in Samuel Butler's "Erewhon" (Butler 1872: chapter fifteen). These institutions form an entirely self-sufficient and "perfect" system -- but they have no concrete function and their absence would make no difference to Erewhon in practical terms. Butler, of course, had the church in mind, but the allegory would fit a judicial system that became wholly specialised and "administrative". Legal concepts properly exist on a kind of inter-level between logic and life. One of the first lessons that a student of law must learn is that many words of common usage are given a specialised juristic meaning, and become terms of art. Thus, "negligence", "injury", "fault" and even "lawful" carry heavy loads of interpretation and commentary. In some instances, special terms evolve (e.g., "tort") which bear this technical quality on their faces, but in the majority of cases an ordinary word is adopted and given a specialised sense. But it is as important to recognise that this sense cannot be wholly specialised, if the courts are to engage with the concrete life of society at all. For example, the legal concept of "negligence" retains much of its everyday motivation as well as its quality

(3) cont.

as a term of art, and it is exactly this "bridging" characteristic that renders it serviceable in both "law" and "life". It was by virtue of its everyday connotations, for instance, that Lord Devlin was able to enlarge the English common law of "negligence" in Hedley Byrne v. Heller (1964) 4 A.C. 465 at p. 516.

(4) See for instance Pound 1923, Stone 1964 and 1966: 50-85, Friedmann 1960: 401-509.

(5) Yet some of the implications of the "pure theory of law" come near it: see Kelsen 1934. Compare in contrast the openly law-making approach of Denning L.J. in, for example, Candler v. Crane Christmas (1951) 2 K.B. 164 at p. 178.

(6) Sir Henry Maine stressed the importance of the stage in legal and social development at which codification takes place. In ancient Rome, it occurred at so early a stage (the Twelve Tables are conventionally dated 451-450 B.C.) that change and growth overran the code, leaving it with only a formal dignity to which lip-service was paid, but which had no practical consequences. Maine suggests that it was because Hindu law was committed to writing if not formally codified after it had developed certain "cruel absurdities" that it acted as a powerfully conservative force (Maine 1950: 15-17).

(7) Until the 'forties, District Commissioners enjoyed and sometimes exercised the powers of magistrates. This meant that they were in a position to issue orders in one capacity and in their other capacity try and sentence those who disobeyed them. In a formal sense, they were not unlike chiefs in this respect, but of course their actions carried no inherent legitimacy

et
Naw

(7) cont.

and they were equally regarded as part of the colonial ruling government in whichever capacity they acted.

(8) In common with other Southern Bantu peoples, the Sotho found that settlers (in this case, the Boer voortrekkers) interpreted the granting of permission to use land, first as a transfer of ownership and then as a surrender of sovereignty (Wilson and Thompson 1969: 364 ff., 405 ff.).

(9) The crucial distinction is perhaps worth underlining. It is seen as the function of the judicial courts to ascertain the existing rights of parties, whatever they may be, and to declare and if necessary enforce them. These courts do not have the competence to create, extinguish or modify rights, this being the function of administration. Hence, in a boundary (area) dispute, it is the task of the judicial court to find out what the lawful boundary is. This involves or may involve adjudicating which chief it was who had the right to make a boundary, and also whether subsequent alterations of that boundary were lawfully or unlawfully made. But the judicial court can neither make a boundary where none exists, nor correct an unsatisfactory but lawfully created one. Conversely, it is the function of administration to create, extinguish or modify rights, provided it does so within its delegated competence, and the existing rights of parties are purely ancillary to this process. Administration may, in other words, weigh the existing rights as one factor in the case, but must not allow itself to be bound by them in coming to its decision. It will be argued that the polarity thus set up is inappropriate in the Sotho context, leading as it does to a rigid view of vested rights on the one hand and to administrative arbitrariness on the other.

NOTES TO CHAPTER SEVEN (cont)

(10) This was the view expressed to me in 1964 by Chief Kelebone Nkuebe, an old man with great experience of customary law and customary courts in Basutoland.

(11) The word lekhotla, besides meaning "court" in the judicial and administrative senses, is also used of any deliberative assembly (the National Council was the Lekhotla la Lesotho) and in addition is applied to a band or regiment of people or warriors. The Congress Party (though usually referred to as "BCP" as in English or as "Kongerese") is the Lekhotla la Mahatammoho, the "court" of those who march together.

(12) The distinction overlaps with that between "formal" and "substantive" justice though it is not identical with it and has fewer evaluative implications. There are many circumstances where the content of a rule is virtually irrelevant, and only the fact of the rule matters. This extends beyond such obvious cases as rules laying down which side of the road is to be used by motor vehicles, and is equally true of wide areas in, for example, the law of contract. It is more important that the parties to a contract should know what the rules are, have access to authoritative and agreed sources of decision in the case of a dispute, understand the extent and limits of their power to alter the assumptions of law, and recognise the area where the law is silent than that the rules themselves should be of one kind rather than another (cf. Hamnett 1961: 373 f.). Formal justice, in fact, can be the vehicle of substantive justice, and should not be regarded as necessarily either hostile or indifferent to it.

(13) Banton (1965a: 34) refers to these as "general roles". It should, however, be noted that Banton uses the concept of differentiation in an idiosyncratic sense

(13) cont.

which is not followed here. The present approach relies on Parsons 1939; 1954: ch.2.

For an account of the social organisation of the Faculty of Advocates and the Court of Session based upon an analysis of roles, see Wilson 1965.

(14) For melato ha e lefane, see Rankali v. Thelelisane J.C. 162/60, Mosoeunyane v. Khomoeamollo J.C. 27/61 (where the maxim is quoted in terms by the A.C.III Court at Leribe); Mokonyana v. Motumi J.C. 102/61; Nonyana v. Ralilochane J.C. 128/61. The Judicial Commissioner's Court normally observed the precept in this maxim, but was much more reluctant to accept that molato ha o bole. In Mafisa v. Mots'oene J.C. 305/49 a debt was described as unenforceable after thirty or forty years. In Dimema v. Velaphe J.C. 5/45, the Judicial Commissioner even held that a creditor must prosecute his claim during his lifetime. In Makibi v. Khosi J.C. 83/57, the Judicial Commissioner refused to entertain a claim dating back twenty-nine years. The doctrine adopted was that the debt may not actually cease to be due, but that the right to sue for it lapsed; this is not so vacuous a distinction, in principle, as it may appear, since it means that if the creditor can at any time lawfully gain possession of what would settle the debt, he is entitled to resist the debtor's claim for its return (naturalis obligatio). In Njeke v. Ranthiba J.C. 61/59, the A.C.I Court at Matsieng refused to entertain a claim for a debt going back for sixty years. (Of course, in such cases the extreme difficulty of proof can also provide a quite separate obstacle to the claimant.)

(15) Other instances of Basotho Court behaviour that conflict with "declaratory" norms include the following:

(15) cont.

Leabua v. P.C. J.C. 59/44 (the Paramount Chief's Court threatened Leabua with loss of jurisdiction if he continued to threaten the Paramount Chief; the court in this case combined "judicial" and "administrative" functions quite consciously; and it also emerged in the course of the case that it refused to allow appeals to proceed to the Judicial Commissioner in land disputes until the Paramount Chief had confirmed the Court's decision); Makhomo v. Lerotholi J.C. 75/45 (in the course of a civil action, a crime came to light and a fine was imposed by the Paramount Chief's Court; similarly in Rachobane v. Khoarai J.C. 14/45); 'Makhoana v. Setho J.C. 188/45 (the Paramount Chief administratively reversed her own court's judgment); Jonathan v. Tumo J.C. 264/45 (the Paramount Chief's Court acted as though it had the power to effect a "placing"); Morolong v. Borena J.C. 33/60 (in the absence of the prosecutor, the President of Leribe A.C. III Court called and led the chieftainship witness); Rakhoboso v. Nkaka J.C. 49/51 (Paramount Chief's Court ordered the equitable division of an estate, and later called the cattle before the Court for division: cf. Nthathakane J.C. 78/44 in text); Macolela v. Ntereke J.C. 109/58 (the Basotho Court of first instance awarded an article in dispute to the claimant, not the possessor, thus "inverting the onus of proof"; cf. Mosotheoane v. Malefane J.C. 17/59, where a violently deprived landholder was required to sue the person who evicted him); Matjatumile v. Khale J.C. 237/54 (the plaintiff had possession of a disputed beast, and went to the court to have his right affirmed); Phiri J.C. 87/57 (the plaintiff came to court claiming a land and put the defendant to his proof); Laboroko J.C. 200/48 (one of a long line of cases where the plaintiff asks the court to assess the quantum of his claim; in Tlape v. Mosoabi J.C. 217/53

(15) cont.

the plaintiff was aware of the Judicial Commissioner's insistence on a specified claim, and where the sum involved was about £28 he sued for £59,600); Molato v. Moeko J.C. 3/56 (a criminal case, where the prosecution witnesses (PW) and defence witnesses (DW) were examined and cross-examined (X) in the following order: PW 1, DW 1, PW 1 X, DW 1 X, DW 2, DW 3, DW 3 X, PW 2, PW 2 X, DW 2 X, DW 4, DW 4 X, PW 3, PW 3 X); Nkhasi v. Mansel J.C. 241/53 (one of many divorce cases where the Basotho Courts issued exhortations to the parties; the B Court at Leribe said, "The Court does not find any reason why it should divorce elderly persons like you, who should lead an exemplary life, and who are due to have a daughter-in-law to whom they must give moral instruction.... Go and keep peace and give a good example to your children....").

(16) The relationship between the judicial and the administrative spheres creates profound intellectual as well as practical problems in modern jurisdictions. An outstandingly perceptive discussion of the concept of "justiciability" is to be found in Marshall 1961: passim. That the dilemma confronting administrative tribunals is an omnipresent one, and not simply the product of Sotho inexperience, is shown in Shapiro's illustration of the way in which it is experienced in the contemporary United States (Shapiro 1965). Arbitrary action is or may be struck down by the courts on the grounds that it is contrary to justice; but the establishment of rules and the following of previous decisions carry the risk that the administrative tribunal will have its findings quashed by the courts on the ground that it has acted "judicially". The difficulties seem much more acute in the Anglo-American common law jurisdictions than in the civilian and code-based continental systems, where the

(16) cont.

droit administratif and its analogues -- so profoundly misunderstood by Dicey -- have made possible an alternative approach (Dicey 1948: lxxi-xcv, 183-283; Wade 1961: 7f.). The common-law tradition has been to seek ever more delicate points of articulation between "law" and "discretion", providing different institutional structures for each and linking them only at the level, and within the constraints, of review procedure.

(17) Customary law can perhaps be regarded as that subclass of "executive law" that prevails in the absence of writing and of a specialised legislature. Ethnographically, it corresponds to the anthropological cluster designated as "traditional monarchies" and is found in conjunction with an economy and a system of internal stratification marked by a limited but still significant degree of differentiation. Analytically, however, there is no justification for limiting the general category of "executive law" to this particular empirical case.

(18) See Chapter Five, note 24 and text, Chapter Six, note 38 and text. Analysts of "judicial" or "declaratory" systems, of course, correctly apply the same judgment to them too: the difference, however, being that in such systems practice contradicts theory (Stone 1964) and an effective legislature is always present to supply the deficiencies of either. In Basutoland, an attempt was made to bring practice into line with a theory that lacked the institutional support to render it plausible. In the absence of a responsive legislature, a "judicial" system necessarily acts (as Coke wished it to) as an unbendingly conservative sovereign, insulated from and impervious to events, which are recognised only as extra-legal activities operating behind the barriers of administrative discretion.

(19) Review procedure usually concerns itself with whether a decision was made "in good faith", and whether the criteria of audiatur et altera pars and nemo sit iudex in causa sua were adhered to. The remedy is normally to remit the matter for reconsideration by the competent authority rather than to substitute an alternative decision.

(20) This is the tendency of both Marxist and positivist "social control" conceptions of the normative universe of action. Marxism, at least in its more sophisticated forms, has the merit of acknowledging the reality of legitimacy, while characterising it (often very convincingly) as "false consciousness"; the theoretical difficulty here is that it is not easy to see what criterion of falseness can itself escape the toils of "consciousness" in the end: and if none can, then what it can be that enables the judgment to be made. Malinowskian positivism, on the other hand, simply fails to take seriously the specificity of law itself, since it has no means of handling the problem of consciousness at all. Durkheim (1912) confronted the same issues in his study of religion, and although his solution is certainly highly vulnerable, it offers insights into an anthropology or sociology of law that deserve exploration. Much of Elementary Forms could be reformulated as an analysis of law in society, with the "normative" replacing the "sacred" as the organising concept. The substitution of "mediations" for "interdictions" (taboos) would provide a conceptual bridge between orders of reality which are related in a way that Durkheim was aware of but which, in his anxiety to underline the dichotomies of religious action, he never adequately explained. But the issue is, as he recognised, one of linkages between discrete orders of social reality, not

(20) cont.

points along a continuum. Social control doctrines, whether of a positivist or vulgar-Marxist kind, fall short of the reality of law, just as the doctrines of his contemporaries fell short, in Durkheim's eyes, of the reality of religion.

APPENDIX ONE

Some Footnotes on Kinship and Affinity *1. Sibling Terminology

The basic rule is that siblings of like sex and siblings of opposite sex are distinguished. The term of address ngoaneso will be used by male EGO to male ALTER and by female ego to female alter. EGO will use khaitsemi to female alter, and ego will use it to male ALTER. Ngoaneso is also used as a term of address to parallel cousins (matrilateral and patrilateral of the same sex according to the same rule, as is khaitsemi between parallel cousins of opposite sex. Cross-cousins, however, are addressed (and referred to) as motsoala (pl. batsoala), without any necessary discrimination of sex.

The literal meaning of ngoaneso is "child of my place". The plural -- "children of my place", "my

* These footnotes are intended to supplement and not to replace the already published material (e.g., Ashton 1967: 324 ff.). They reflect the evidence I encountered, and make no claim to be either definitive or unfalsifiable. The generalisations attempted are offered as suggestions or hypotheses that invite both more evidence and further analysis.

brothers" -- is bana beso. The second and third person terms are ngoaneno (pl. bana beno) and ngoanabo (bana babo) respectively. Thus, it can be said that two men are bana babo of a third man. But if it is desired to say that two (or more) men are brothers (sc., of each other) then they are described as bana ba motho, "children of one person". The "person" may, of course, be more than one generation removed, as in the case of parallel cousins, and also of the children of parallel cousins (who are also bana ba motho since their fathers address each other as ngoaneso). Thus, where two persons are so related that they use ngoaneso to each other, the relationship persists into the next generation, whereas where they use khaitseli it is replaced by the term motsoala. (Basotho when speaking English translate ngoaneso by "brother" or occasionally "cousin-brother", and khaitseli by "sister" etc., using the unqualified "cousin" exclusively for batsoala.) The saying, "motsoala oa hao ke mosali oa hao" ("your cross-cousin is your wife"), brings out the distinction clearly; although parallel-cousin marriage (particularly with FbD) has been practised more especially among the higher chieftainship for "strengthening of the blood", it is not a generally approved practice (at least in theory), and it would certainly be inconceivable to substitute khaitseli for motsoala in the saying quoted.

2. Affinal terminology

A man uses the term mosali (woman) of his own wife (and descriptively of another man's wife). He also uses it of or to the wife of any man whom he calls ngoaneso, e.g., Bw, FBSw, mzSw. Similarly, a woman calls her husband monna (man), and uses this term to the husband of any woman whom she calls ngoaneso, e.g., zH, FBdH. A man will also use mosali to the sister of his wife, and to the sister of his brother's wife (Bwz); and a woman will use monna to her husband's brother, or her sister's husband's brother (zHB). The terms MONNA/mosali are thus reciprocal, and are used where the sibling links are between persons of like sex, including relationships between parallel cousins. It is not used where the sibling link is between persons of opposite sex, or where the link is between cross-cousins (whether of the same sex or not); e.g., ego will not use monna to her BwB, HzH, FzdH, etc., and EGO will not use mosali to his zHz, wBw, FzSw, etc.

Male EGO will use the term mofobe of or to a man who has married a woman whom EGO's wife calls ngoaneso: e.g., wzH. More simply, the term mofobe is used between men who have married sisters. It would also be used by a man to his BwzH, since he calls his Bwz mosali. It will be noted that here again the sibling links are between persons of like sex, and that though these may be replaced by parallel cousin links of like

sex, this is not true of cross-cousin links whether of like sex or not.

As mofobe is used between men who have married sisters, so molamo is used between women who have married brothers: female ego will use molamo of and to her HBw, and similarly her HBwz. But here the parallelism stops, since molamo is used also (and indeed primarily) for brother's wife (Bw) and husband's sister (Hz), whereas male EGO does not use mofobe for zH or wB. In other words, molamo can be used across a sibling link of unlike sex whereas mofobe cannot. However, at the level of cousins, the two terms are similar in that neither term can be used of cross-cousins, though molamo, unlike mofobe, can be used across parallel cousins of unlike sex (mzSw, FBSw).

Molamo is also used to zHz (Bwz); but such evidence as could be gathered suggested that it is not used of, for example, BwBw or its reciprocal HzHz. It is interesting to notice that these relationships involve not one but two sibling links of unlike sex.

In all cases where a cross-cousin's spouse or a spouse's cross-cousin is in question, the term motsoala is used (with or without a qualification such as monna oa mostoala or mosali oa motsoala).

The account so far has omitted many important and universal relationships, e.g., male EGO to zH, zHz, zHB, wB, and female ego to BwB, HzH. The term used in such

relationships is soare, and in the logic of the present analysis this represents a residual class, accommodating all relationships where the terms monna, mosali, mofobe, molamo and motsoala are excluded. For instance, whereas molamo (unlike mofobe) can, as has been seen, "survive" one sibling link of unlike sex, it does not survive two such links, and at that point soare is used; and when the link of like sex in the wzH (mofobe) relationship is replaced by a link of unlike sex (BwB or wB), again soare is used. (It is interesting to observe that the word soare (also sebare) is the Sotho-ised form of the Afrikaans swaer. This does not, in fact, diminish its analytical significance, since many Afrikaans words have become completely Sotho-ised and incorporated into the language as Sotho words. Ashton is right to include without apology such kinship terms as soare, aubuti and ausi in his lists (Ashton 1967: 325). Many Afrikaans words have been adopted since there were no others available, e.g., borogo, bridge (from brug) and toropo, town, (dorp); but some have extruded an existing word: e.g., pere (from Afrikaans perd), meaning horse, has largely replaced the Sotho pitsi. Sotho-isation is so complete that where the first syllable of a foreign word resembles a Sotho noun prefix, the plural is formed by changing the prefix: thus the Afrikaans skool (school), having been Sotho-ised as sekolo, takes the plural form likolo, according to the normal rule for Class 4 nouns

(classes 7 and 8 in Meinhof's classification: Doke 1954: 52). The plural of soare is bo-soare, on the same rule as malome (mB), pl. bo-malome, 'mangoane (mz), pl. bo-'mangoane, etc.)

What has been attempted here has been to extract some structural form from the apparently random affinal terms as simply "listed". While it is not maintained that the usages described are all always uniformly observed, the best evidence available supported the account that has been given. The analysis depends, as has been seen, on projecting the distinction between like and unlike sibling links (central to the ngoaneso/khaitseli terminology, and to the differentiation of parallel and cross cousins) into affinal relationships. A pattern thus emerges which enables the somewhat complex "rules" suggested above to be presented in a simple and ordered form. In the tables that follow, the letters NG mean that the link is across siblings of like sex, and KH that it is across siblings of unlike sex. Capitals are used where the person addressed is male, lower case where she is female. (It should be remembered, as stated above, that cross-cousins and cross-cousin links are a separate matter and do not form part of this analysis.)

TABLE A

1. Man speaking to woman or vice versa
 - a) NG: mosali, MONNA
 - b) KH: soare, SOARE

2. Man speaking to man
 - a) NG: MOFOBE
 - b) KH: SOARE
3.
 - a) NG OR KH: molamo
 - b) KH, KH: soare

A more economical presentation still reduces the cases from six to five:

TABLE B

1. Man speaking
 - a) NG: mosali, MONNA
 - b) KH: soare, SOARE
2. Woman speaking
 - a) NG: MONNA, molamo
 - b) KH: SOARE, molamo
 - c) KH, KH: soare

(See also the diagrammatic representation in fig.1, "A Structure for the Sotho terminology of affines.")

A particularly interesting feature of the system is the fact that, as shown, mofobe and molamo are not mirror images of each other. At the most general level, this failure in isomorphism is an instance of the anthropological platitude that there is a basic asymmetry in the structuring of male and female roles; a patrilineal system is not transformed into a matrilineal system simply by the reversal of terms (Levi-Strauss 1969). Thus, in the Sesotho context, the fact that molamo continues to be used in relationships where mofobe is not, is a function of the structural position of women

in the system. A woman is a member of her brother's (father's) group, or of her husband's, or of both. Moreover, her incorporation into a group, whether by birth or marriage, is unevenly weighted, in that it is the brother's or the husband's group that incorporates the woman who is incorporated. It can be argued that, within her family of origin, the "unity of the sibling group" brings a woman into so close a relationship with her brother that the sibling bond "carries through", across the unlikeness of sex between herself and her brother. But because of the passive nature of her incorporation, it does not follow that her relationship to him and through him is the same as his relationship to her and through her (see Goodenough's warning on the danger of attempting to "read off" reciprocities from one side of a relationship on to the other: Goodenough 1965: 8 and passim). Where the relationship in question is not of the monna-mosali type (e.g., zH), one of her links will necessarily be across a sibling bond of unlike sex (KH-type link). It is as though one KH-type link were "taken for granted" in the system so far as women are concerned, so that "molamo" fails only when there are a plurality of such links. But a man, as the immediate bearer of relationships and the agent of active incorporation, is as it were not "allowed" even one, so that across even a single KH-type link, "mofobe" fails.

The survival of the sibling link between EGO and z (ego and B) after the sister's marriage is reflected in the special relationship that exists between malome (mB) and mochana (zS, zd) -- a relationship already celebrated in the literature (Radcliffe-Brown 1952: 15-31) and too familiar to need further explicit documentation here (cf. Sekese 1962: 35, 59, 60f., 66, 69; Duncan 1960: 25f.; Laws of Lerotholi (1959) Part I, s.5; see also the following sections of this appendix). This suggests how the z-B link continues to structure affinal terminology after the sister's (and not only after the brother's) marriage, and offers an explanation of the fact that a woman is, so to speak, "credited" with one KH-type bond, where a man is not.

This approach impliedly and perhaps somewhat uncritically accepts the "complementary filiation" rather than the "alliance" frame of reference (Dumont 1957, Fortes 1959, Leach 1961 etc.); but until some means can be found of locating a structure in the use of affinal terms that does not depend centrally on the ngoaneso/khaitsele discrimination, the present approach seems the most satisfactory, and the most theoretically parsimonious. Of course, it may be that there is no "structure" in the matter at all; but this is the last rather than the first conclusion in which the analyst should seek refuge.

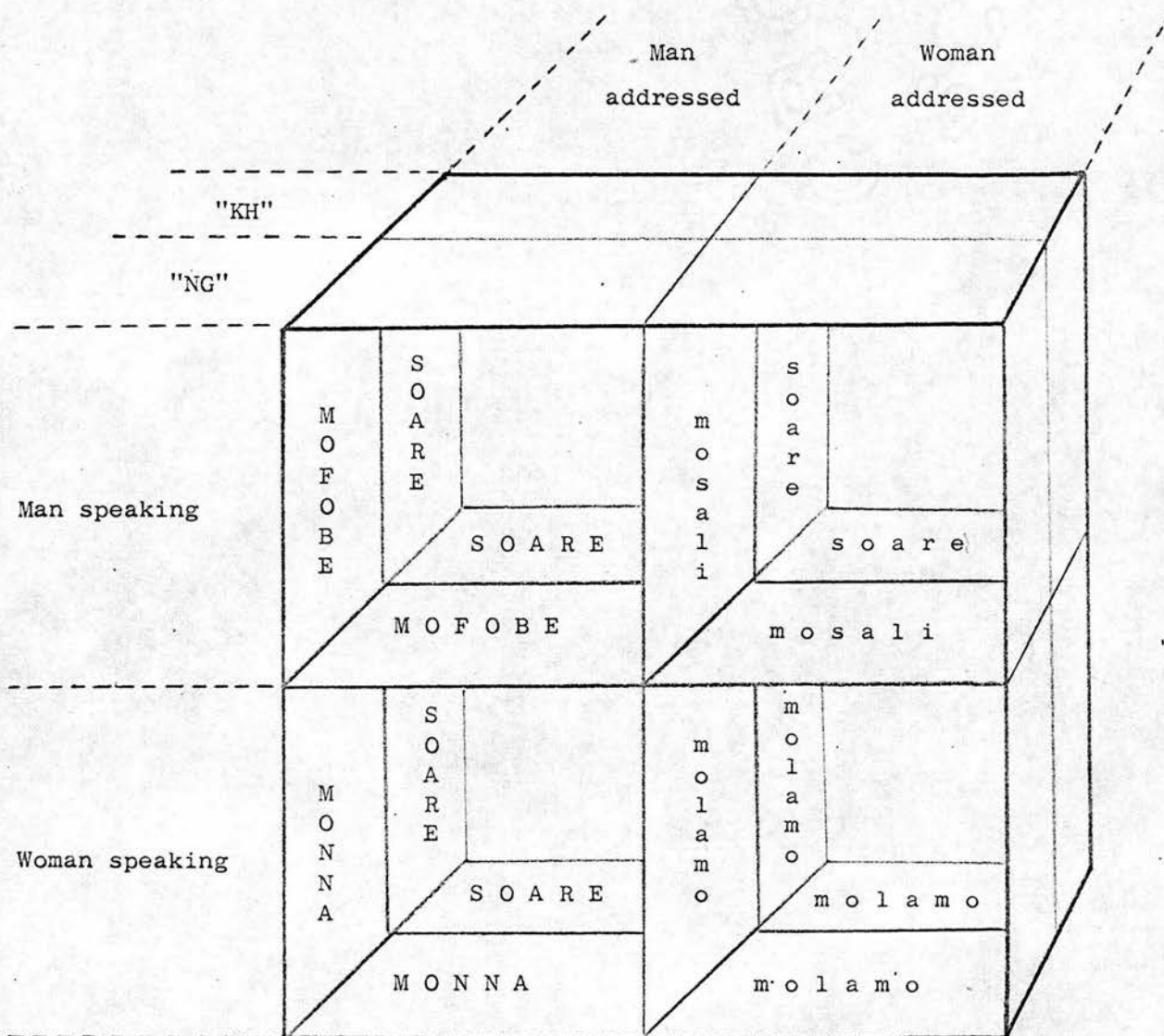




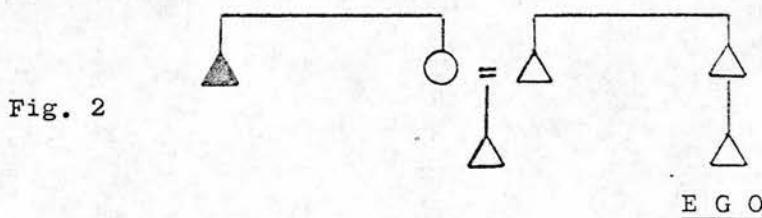
Fig. 1

A STRUCTURE FOR THE SOTHO TERMINOLOGY OF AFFINES

3. Some Forms of the "malome" relationship

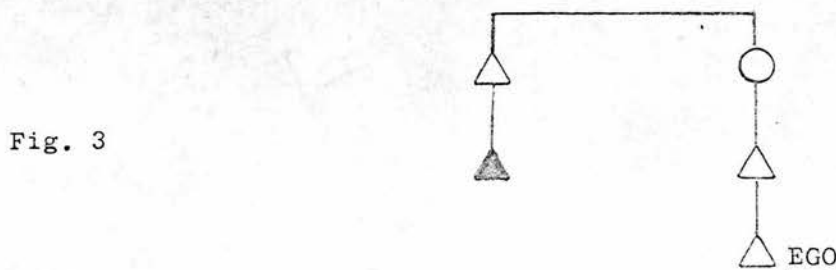
Figures 2 to 5 illustrate some cases of what may be called "malome variants", where EGO is classified as "sister's son" (mo-chana) to his FBwB, FmBS, FBwBSw and mmBS respectively. The malome is indicated by  or  in each case. (Note that a woman can be malome, but only through marriage.)

a) FBwB



If FB is elder brother of EGO's F, he is ntate moholo to EGO, the same term being used for FF. The wife of EGO's ntate moholo is his nkhono (used also for Fm, mm), so that her brother is a kind of mB, i.e., a malome. Further, EGO's FBwB is malome to FBS, whom EGO, as a parallel cousin, calls ngoaneso.

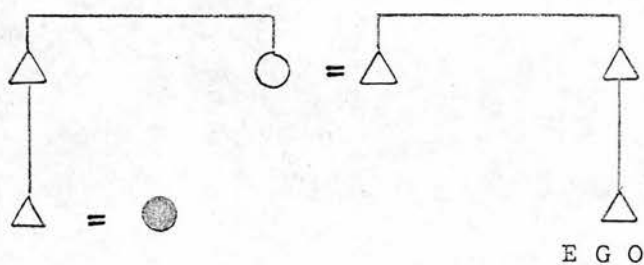
b) FmBS



Since FmB is malome to EGO's F, then FmBS is by parallelism a malome to EGO.

c) FBwBSw

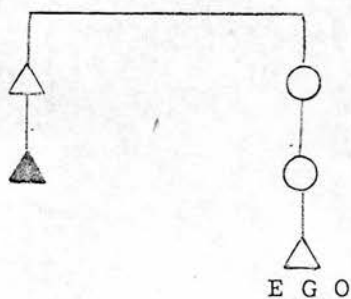
Fig. 4



In b) above, EGO's malome is his nkhono's brother's son (FmBS). Here, the nkhono is the paternal aunt by marriage, the wife of EGO's ntate moholo (F(elder)Bw). EGO's FBwBS and his wife can thus be a kind of bo-malome to EGO. This is the only explanation that seems possible for Ashton's report (1967: 324) that FBwBSw is a malome.

d) mmBS

Fig. 5



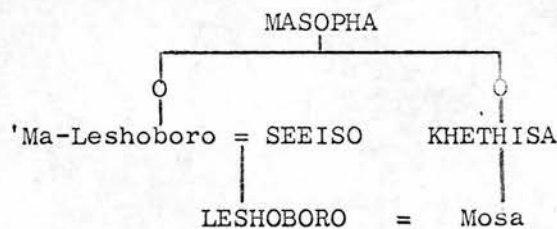
EGO's mmBS can be regarded as a malome. This is contrary to the "rule" that the child of a khaitseli is a mochana (complementary to malome), whereas the child of a mochana is ngoanaka (complementary to ntate). The explanation appears to be that mmBS retains something of the quality of mB, since the two lines are related in this configuration. Since mmB is clearly malome to m, by parallelism mmBS is malome to mS, viz., to EGO. But whereas in b) the parallelism was through a male, here it appears to be through a female. This is an authenticated instance that was thoroughly explored, and no relationship existed between EGO's F and m within any recognised genealogical proximity.

4. The malome in cross-cousin marriage

The "normal" flow of bohali is from malome to mochana, in that the malome commonly helps his sister's son on the latter's marriage and has a claim to a share of the cattle received for the marriage of his sister's daughter (lits'oa: cf. Laws of Lerotholi Part I, 1959 ed., sec. 5). Where EGO marries mBd, however, the direction is reversed, bohali passing from mochana to malome; hence the latter will often reduce the amount of bohali by paying some himself.

Leshoboro Seeiso, Principal Chief of Likhoele and half-brother to the Paramount Chief, married his cross-cousin, the daughter of Chief Khethisa Tau. Bohali was fixed at fifty head (this being a high chiefly marriage), of which Khethisa "paid" ten himself. (It will be seen that KHETHISA and 'Ma-Leshoboro are parallel cousins, since their mothers were sisters. They are therefore khai-tseli to each other, and their children are in consequence batsoala.)

Fig. 6



The Dispute over the Chieftainship of Patlong

This is an account of the action raised by Mpiti Sekake against Mitchell Tautona and Chieftainess 'Mantoetse (Sekake v. Tautona J.C.15/59) over the chieftainship of Patlong. It raises many questions relating to "public" and "private" succession and inheritance, illustrating several themes discussed in the text, especially in Chapters Two and Five. Genealogies of the principal actors in the case are attached, which also reveal the main elements in the lineage structure involved (see fig.s 1 to 3). (Some of the wider background can be found in Jones 1966: 64ff., 74ff.)

Patlong is an important chieftainship within the Principal Ward of Rats'oleli and Mashai (Qacha's Nek), where the Principal Chief in the relevant period was David Theko Makhaola. It is ruled by the senior segment of the Mosothoane maximal lineage, whose principal "nested" segments for the purposes of the case are those of Makoe, Sekake and Sehapa.

Sehapa Sekake (Sekake I as marked on the genealogy and as named in the following account of the case, but the second chief of Patlong with that name) had two sons in his first house, Tautona (the elder) and Sekake II (the younger). Tautona succeeded his father and

Fig. 2

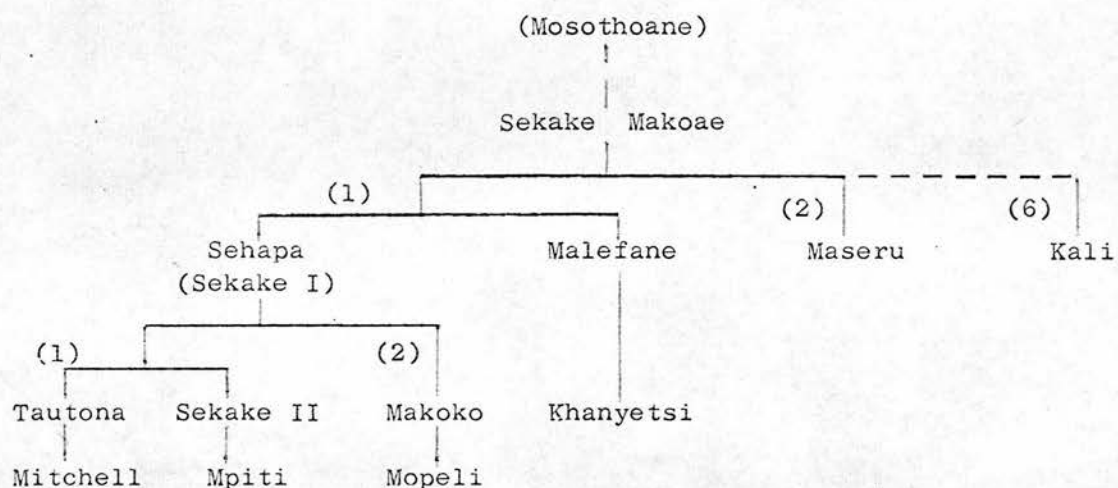
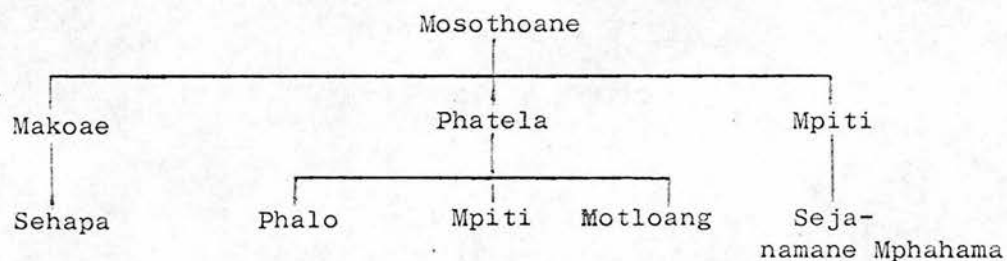
THE SONS OF SEKAKE

Fig. 3

THE SONS OF MOSOTHOANEPRINCIPAL LINEAGE SEGMENTS IN SEKAKE v. TAUTONA

had five wives in the following order of seniority:

(1) 'Matsatsane (Lefa) (2) Liketseng (3) 'Mathabo
(4) 'Mantoetse (5) 'Masebueng. (There is some
evidence of a further wife, Mats'eliso, between the
first and the second on this list.)

At Tautona's death in 1928, there was no male
issue in the first or second house. In the third
house there was an infant son, Thabo, who died shortly
afterwards in 1929. The fourth and fifth houses
were also barren of male issue in 1928. However, in
1933, 'Mantoetse in the fourth house became the mother
of Mitchell, the child of a union between herself and
her late husband's younger brother Sekake II (who also
acted as regent for the young child Thabo in the short
interval between Tautona's death and the boy's).
By his own marriage, Sekake had a son, Mpiti, who
raised the action here discussed.

Tautona's marriage in his fourth house forms an
important element in the case. He lived irregularly
with a woman called Potlako, who was herself the wife
of one Ntlama Tlhakanelo. It was alleged that
Tautona married 'Mantoetse into the same house (his
fourth) as a ngoetsi or subsidiary wife to Potlako,
apparently at the latter's insistence.

The Chieftainship of Patlong passed in 1935 to
'Mathabo, Tautona's third wife, and she reigned in
her own right until her execution in 1952. However,

she attempted during the course of her reign to raise an heir to the chieftainship in her own house by entering into a woman-marriage with Mpho, who in due course gave birth to a child, Sekake III, whom 'Mathabo sought to have recognised as her successor. (An alternative view is that 'Mathabo married Mpho to the grave of her dead son Thabo.) 'Mathabo's action, which she justified on the grounds that, as full chieftainess, she "was Tautona" and "ate" all his rights, was accepted by some of the sons of Makoe but opposed by others.

There thus emerged three possible claimants to the chieftainship: Mpiti, Tautona and Sekake III. The dispute, however, is dominated by the first two of these, and the history of their rivalry, together with the arguments which each side marshalled, forms the subject of these pages.

The first record is of a dispute between Sekake II and Chieftainess 'Mathabo in 1941. It appears from the judgment of the Civil Appeal Court that Sekake had been convicted and fined by the Paramount Chief for an assault on 'Mathabo. This was provoked, according to Sekake, by the chieftainess's dalliance with an outsider, one Rahlolo, which Sekake regarded as an affront to him as male head of the family with kenelo (levirate) rights over her. At the time, Sekake II

was also 'Mathabo's principal counsellor (letona, right hand). The conviction was upheld.

In October 1949, 'Mathabo appears to have attempted some form of coup on behalf of her "son" Sekake III. When this failed, as a result of opposition from the Sons of Makoe, she had recourse to the Chief's Courts against her rival 'Mantoetse. At some point in the early 1950's, 'Mantoetse and 'Mathabo took their dispute to the court of the Principal Chief of Qacha's Nek. From the judgment of the court it is apparent that 'Mathabo named her sons in order of succession as Sekake III, then Mitchell, then Mitchell's two younger brothers in the house of 'Mantoetse. She thus assumed all the children of Tautona's houses as her sons (she being chieftainess) and ranked them in order of seniority. Against this, it was argued that the custom of woman marriage was illegal, and that even if it were not, Mpho would be no more than an insignificant wife, a "broom" or lefielo, in the house of Makoe, and her son could not be heir. The banna ba lekhotla (men of the court) at Qacha's Nek rejected 'Mathabo's claim, arguing somewhat inconsistently that there was insufficient evidence of woman-marriage for it to be accepted as legitimate custom, and also that such marriages had been a source of incessant unrest in the nation. (It may be that the second part of this argument related to "secondary" marriages in general, while the first

referred more narrowly to woman-marriages.) Mitchell was accepted as the son of 'Mantoetse, whose possible status as ngetsi to Potlako (was was already married to another man, as has been seen) was not brought in as an issue.

The records then show that in 1952, following 'Mathabo's execution, the Principal Chief called upon the "family" in its wide sense -- the Sons of Mosothoane -- to propose a successor. In November of that year, Patlong ward reported back to the chief that "the family gives you Mpiti Sekake as the guardian of Mitchell Tautona", adding that "a group of the people, being men of Patlong, gives you Mpiti Sekake to be chief, not guardian". Thirty-nine voices were raised for the first of these motions, and thirty-six for the second. But it was stressed that "we do not consider the number of votes, but we of the family wish to inform you that there have been different opinions," and the Chief was invited to convene a further meeting in Patlong if he wished to hear for himself.

The chief acted swiftly. Within a week or two, he sent three representatives to Patlong, who were present at a meeting of the Sons of Mosothoane and of the people of Patlong. The chairman was Kali Sekake, a junior son in Sekake's house, who had been appointed as Acting Chief after 'Mathabo's arrest and imprisonment awaiting trial. Mpho, 'Mantoetse and Mpiti were among

those who spoke. Mpho seems simply to have declared her position as having been married into 'Mathabo's house and having born an heir to the chieftainship in the person of Sekake III. 'Mantoetse argued for Mitchell, as heir to the second house, there being no male issue in the first. Mpiti, for reasons which the record does not disclose, appears to have acknowledged Mitchell as heir, with himself as the second in line. Some difference expressed itself between the Sons of Makoe, or a large group of them, in favour of Mitchell, and a wider section of the people of Patlong (supported by a smaller Makoe faction) in favour of Mpiti. The Principal Chief appears to have favoured Mitchell, or at least discountenanced Mpiti. The upshot was (at least according to Kali Makoe's report) that the sons of Mosothoane agreed that Mitchell was successor and that Mpiti was to act for him until his majority. They went on to propose Mitchell as the successor of his own father, Sekake II, as chief of Thabana-Ts'ooana (White Hill), a major headmanship within the ward of Patlong. The Principal Chief's representatives reported this latter proposition back, while acknowledging that it was not part of the original brief. For the rest, at all events, it is clear that Chief Makhaola accepted the report and acknowledged Mitchell as heir, with Mpiti as regent and guardian.

However, this outcome failed to satisfy either

'Mantoetse, who did not welcome Mpiti as guardian to her son, or Mpiti himself, who now reasserted (if indeed he had ever in fact withdrawn) his claim to full chieftainship. However that may be, Mpiti declined to come before his chief, Makhaola, for confirmation in any junior capacity, and in July 1953 made an open bid for control by assuming the chieftainship of Patlong. The dispute that this action sparked off came before the Paramount Chief in January 1955, and the case was heard by two senior chiefs (one of them Leshoboro, Principal Chief of Majara's and heir to Moshoeshoe's fourth "cardinal" line).

A major preoccupation of the court was the fact (admitted on all sides) that 'Mathabo had been appointed as Chieftainess in her own right, not as regent, and that she had continued in this position till her death. Mpiti argued that this was an implicit denial of Mitchell's claim, since if there were in fact a direct male heir to the late chief, viz., Mitchell, then 'Mathabo would have been only a regent for that heir (women become full chiefs only if there is no male son). Accordingly, in the absence of such an heir (as implied by 'Mathabo's status as full chief) the proviso in Laws of Lerotholi (1946) sec.2 applied, in terms of which "if a chief dies leaving no male issue, the chieftainship shall devolve upon the male following according to the succession of houses". This, according

to Mpiti, would have brought the succession to his father Sekake II, and thence to him.

The Paramount Chief's court neatly countered this brilliant initiative of Mpiti's by pointing out that 'Mathabo's proclamation as a chieftainess in her own right actually negated Mpiti's argument, since Tautona's chieftainship had not in fact passed to Sekake II. Moreover, the Laws of Lerotholi were silent on questions of posthumous children, and did not therefore exclude the succession of such. The court went further, and opined that even if Mpiti were right in his theory of fraternal succession, this was a custom falling into desuetude and no longer a determinant of succession. The published Laws of Lerotholi were described as "a mere declaration of custom, rather than laws" and, as a declaration, could be overtaken by change. They then rather abruptly switched their direction, and asserted that the law of posthumous succession held good, no matter what a new-fangled declaration might purport to say. (No doubt the judges were somewhat embarrassed by the fact that Paramount Chief Griffith's succession was a case both of fraternal succession and of the rejection of a posthumously conceived son.) The decision was, therefore, unequivocally for Mitchell, Mpiti being stripped even of his position as regent and guardian; 'Mantoetse was appointed in his place.

But before Mitchell's confirmation and Mpiti's

rejection were confirmed, the Resident Commissioner and the Paramount Chief (the latter no doubt acting at the former's instance) agreed to allow Mpiti an opportunity to test his claim once more in the courts, Mitchell's nomination continuing to be accepted for administrative purposes meanwhile, but without prejudice to Mpiti's eventual rights. The case was obviously one for the Basotho Courts, and was assigned to a Special Court under the experienced president A.D. Maime, which met at Qacha's Nek in November and December 1957. An account of this hearing now follows.

After a fairly uncontroversial rehearsal of some basic facts, Mpiti presented his case by arguing that Mitchell was not lawfully born to 'Mantoetse in such a way to entitle him to succeed to the chieftainship. In fact, Mpiti asserted, he was in law the child of Potlako, and Ntlama's son by cattle. He elaborated this assertion by explaining that 'Mantoetse had been married with cattle taken as fines from men who had committed adultery with Potlako, who was of course the husband not of Tautona but of Ntlama, to whom the cattle in law belonged. This became one of the central grounds of Mpiti's case, and was argued this way and that throughout the proceedings. Mpiti would also rely on what he alleged to be the defects inherent in a kenelo birth, but his more radical attack was designed to challenge the lawfulness of 'Mantoetse's marriage to

Mitchell's father. If she had been married for Potlako, she could have no greater marital status than the latter, who was no wife at all. The irregularities alleged in Tautona's use of cattle were brought in as still further proof that the marriage was unlawful.

But before leading evidence on the facts, Mpiti introduced Chief Goliath Lets'abisa Senate Malebanye Moshoeshoe, the celebrated ward chief of Likoeneng and supposed genitor of Makhaola Letsie by one of the widows of Paramount Chief Letsie II. Goliath appeared as an expert witness, to speak to the law of the matter, and denied any knowledge of the particular facts under dispute. But this was somewhat disingenuous, since it was known, and emerged before the court, that Mpho (the genetrix of Sekake III) was the daughter of Goliath's junior brother Jagersfontein. He himself was born to Senate's daughter, Lets'abisa, who cohabited with one Malebanye; no bohali was paid by the latter or accepted by Letsie, so that Goliath remained in the house of his mother. (Senate herself as related in Chapter Two was at first intended to be the mother of the Paramount, and no cattle were paid for her union with Joseph Molapo.)

Much of the earlier part of Goliath's evidence was in fact a display of legal and historical virtuosity, and backed his claim to expert knowledge and long experience in the adjudication of question of succession.

On the question of kenelo, he stated that posthumous children were incorporated into the family of the woman to whom they were born, since a child is begotten by cattle -- "belched by a beast". However, when a woman is seduced, if the husband sues the seducer and receives a fine of cattle, the child is legitimised but cannot be an heir. Alternatively, the bohali can be restored and the wife dismissed; in this case, she takes the child with her and he belongs to his mother's people. Goliath seems also (in the light of subsequent comment from witnesses and the court) to have expressed the view that a posthumous child can be heir to an inheritance (lefa) but not successor to a chieftainship. It is not quite clear whether he was in fact expressing this view, or rather distinguishing between the issue of a true kenelo union and the child of a less regular liaison.

He went on to say that when a chief takes out cattle from a particular house to get himself another wife, the woman so acquired is the wife of that house; but that if he takes them from the unallocated portion of his herd, then he can place the new wife in any house, or establish her in one of her own.

Goliath, professing to take the facts as he was told them, gave it as his opinion that the cattle for 'Mantoetse had been taken from Potlako's kraal,

and that she had therefore been married to Potlako's "house"; but since Potlako was not the true wife of a house, 'Mantoetse was no wife either, Mitchell was not the true fruit of kenelo, and the succession passed through Sekake II to Mpiti.

The rest of Mpiti's witnesses testified to the facts of the case. Mokhele Chitja, a self-confessed but plausible thief, agreed that 'Mantoetse had been married for Potlako, and that the cattle paid for her were those of Potlako's kraal, including those that had been taken as fines for adulteries. Potlako was not married to Tautona; and in fact, when Tautona himself had been fined at Ntlama's behest for his own adultery with her, she had pretended to go home to her husband with the fines, but in fact had absconded and gone back to Tautona, bringing the cattle with her. (Chitja explained that he did not mean "cattle with hooves"; in fact, there were four horses and £40 in cash, but he adopted the common Basotho convention of referring to all payments in certain kinds of transaction as "cattle".)

'Malefa, the next witness, was another woman who had been married into Potlako's establishment, and confirmed that it was Potlako who had chosen 'Mantoetse, although Tautona had wanted to take another woman. 'Masebueng, the last of Tautona's wives, had little of interest to say.

She was followed by Mpho, the mother of Sekake III, who testified that 'Mathabo had taken her "as a womb" for the third house, to raise up an heir to the chieftainship; she claimed that the sons of Sekake had deprived her house of its rights. Like several witnesses, Mpho put up a singularly unconvincing pretence of ignorance, even claiming that it was only on the day the case opened in court that she was aware that the chieftainship was being disputed. Admittedly, she had no love for either Mpiti or Mitchell, but her protestations of ignorance and impartiality were clearly largely due to her anxiety not to prejudice her position for the future.

Bolepeletsa, who followed, was not so much a supporter of Mpiti as an adviser and confidant of 'Mathabo, and was called as a witness because he was opposed to Mitchell. His view, however, was that Mitchell was the successor and heir in his own house, but that the chieftainship could not pass to him. He thus took up a less radical position than those who denied Mitchell's filiation altogether.

Chief Phalo Phatela, senior headman at Sekitsing in the Principal Chiefdom of Phamong (Mohale's Hoek) and a Son of Mosothoane like the others, testified that Tautona had taken adultery fines for Potlako and used them to marry 'Mantoetse into Potlako's house. 'Mantoetse was thus never a wife. He also maintained

that the custom of kenelo was falling into disuse, though he did not draw any distinction between inheritance and succession, and did not consider the argument that the relevant date for the alleged desuetude of kenelo was 1933, not 1957.

Mitchell Tautona then opened his case on the other side. Most of his own evidence followed a predictable pattern. He affirmed that as Tautona's son by kenelo he was heir to Patlong, and that Mpiti had at first accepted this. He maintained that he had been installed as chief shortly after 'Mathabo's death and denied that he had either been under 'Mantoetse's guardianship or been installed merely as an acting chief.

He called 'Mantoetse as his first witness. The essential part of her testimony related, of course, to her own marriage. She pointed out that Mpiti's father Sekake II had lived with her leviratically after Tautona's death, thus implicitly acknowledging the validity of her marriage. And she claimed that 'Mathabo, as chieftainess, had never objected to this. Mpiti, she said, had without protest even used 'Mathabo's cattle in 'Mantoetse's house, which he would not have done had he declined to recognise her as Tautona's widow. But she admitted that Potlako was not Tautona's wife, though she went on to claim that she herself had never formed part of Potlako's establishment. She had been brought up as a wife by 'Matsatsane, and misunderstandings

could have arisen since Potlako had also at one time had a sleeping hut in the same enclosure. Her, 'Mantoetse's, own marriage was a lawful marriage by cattle and was independent of Potlako, and her son Tautona was the lawful chief.

Mitchell's mother was followed by Kali Makoe, of a junior house in Kekake's lineage and senior headman at Maboloka within the ward of Patlong; he had acted as chief during 'Mathabo's trial and had been chairman of the meeting held in 1952 of which an account has already been given. It was he who first now testified that Mpho was a brother's daughter to Chief Goliath. He stated that the family had objected to 'Mathabo's arrangement with Mpho, not so much on general principles as because Tautona's wife 'Mantoetse had born her son Mitchell, thus making it unnecessary to resort to special means to raise up a successor. He went on to speak about Mpiti's private life and conduct, bringing into the open certain matters that had only been hinted at before, all more or less to Mpiti's discredit. Mpiti had, in fact, been convicted on several occasions of fairly slight offences. He was also disapproved of for living at a beer-hall and for having married a Griqua wife; in Kali's view, this virtually disqualified him from passing on the chieftainship.

Kali was quite ready to agree that Potlako was not a wife of Tautona, but of Ntlama. 'Mantoetse's marriage

to Tautona, however, was not affected by anything that Potlako did or was. Whore, thief and self-seeker, she was regretted by no one (though Mpiti's failure to call her as a witness was held against him when the court came to consider its decision).

The Principal Chief of Qacha's Nek, Theko Makhaola, came next. He confined himself largely to formal evidence, and while affirming the fact of Mitchell's appointment, showed every sign of standing aloof from the dispute -- "I have tried my best to get to the root of this trouble, but without success". (It emerged, however, that Mitchell's wife was a daughter of Theko's junior brother Makhaola.)

The next witness was Molaoli Sekake, a subject and kinsman of Kali's at Maboloka. He added little of substance to what had gone before, but was called as a member of the house of Makoa who had been present at the critical meetings of the Sons of Mosothoane and could speak to what had taken place there. Sekake Posholi, a son of Sekake, followed and confirmed that 'Mathabo's attempt to promote Sekake III had been rejected by the family. He averred that 'Mantoetse was Tautona's wife and denied that the cattle taken out for her had belonged to Potlako.

The headman of Kolo-la-Tso'ene, Moeketi Mapheelle, followed and introduced some new factors. According to him -- and he claimed close acquaintance with Tautona --

'Mantoetse's father Rantebale had not only demanded the high bohali of twenty-three beasts for his daughter, but had asked to have them all at once. He also stated that it had been Tautona's first wife, 'Matsatsane, who had asked her husband to look after Potlako (her younger sister), since she was unhappy with Ntlama. The cattle paid as fines for Potlako were used by Tautona to provide bohali for junior sons of Sekake, instead of being kept as chieftainship beasts and kraaled at 'Mathabo's, where the chieftainess could use their milk and dung. He went on to deny that 'Mathabo had any original right to the chieftainship of Patlong (he had been engaged in a dispute with her over Kolo-la-Ts'oene) and advanced the interesting proposition that a man who consorted with a concubine was entitled to the adultery fines taken on her behalf, if the woman's husband or lover did not claim them. (There is some ambiguity in this. One view -- the older one -- is that fines are kept by the chief, who will usually pass on a proportion to the injured person. The more modern view is that they are in fact damages, and go to the injured person direct. Moeketi's evidence seems to try to argue in both ways, but to be consistent with neither.) He agreed that Potlako was not Tautona's wife.

Motloang Phatela's evidence added little, unless the record is correct in attributing to him the statement that Mitchell was a son of 'Mathabo, since he was the

child of her late husband Tautona. This probably was his argument, since he went on to discuss (though without answering) the question of whether 'Mathabo had specifically sought a kenelo union for 'Mantoetse. This opened a new road for Mitchell: suggesting that he could claim as heir to the late Chieftainess 'Mathabo as well as to Tautona himself. However, Motloang hedged his bets by asserting ignorance of whether Mitchell had been born before or after Tautona's death. His testimony was followed by a remarkable display of know-thingism by Sejanamane, the major headman of Mphahama's (Pheellong). His repudiation of any knowledge of anything culminated in the memorable assertion that "I have no knowledge of Basotho law and custom". One of his problems was that he was clearly in great awe of his chief, 'Mants'ebo Seisa (who was no connection of the Paramount Chieftainess 'Mants'ebo Seeiso); she was the widow of his senior brother, and Sejanamane did not like to suggest anything that might in any way be taken as a challenge to her rights. But the temptation seems to have been present in his mind.

The evidence of Sera Faso, a junior son of Mosothoane under Phatela (but not considered of the "family"), underlined the point that 'Mathabo's seed-raising by Mpho was superfluous since an heir already existed in the person of Mitchell, whom she could have adopted; and in other respects he supported the other witnesses

for the defendant.

Mitchell's last witness was Mopeli Makoko, headman of Qhoalinyane in the ward of Patlong, and heir to Sekake I's second house. (He was one of the signatories of the letter sent to Makhaola in November 1952 reporting that the "family" favoured Mitchell; Chief Phalo Phatela (Mpiti's witness) had also signed the letter, but later alleged that he had been coerced into doing so by Mopeli.) He firmly repeated what had been said before, stressing the rejection of Sekake III and underlining that the great bulk of the Sons of Mosothoane had given their support to Mitchell. Mopeli also stressed that 'Mathabo was not entitled to take any decisions on her own, and that her purported marriage to Mpho was unacceptable because she had acted without, or against, the authority of the Sons of Sekake. On the issue between Mitchell and Mpiti, however, Mopeli alone of all the defendant's witnesses betrayed the fact that, after Mitchell's appointment, the "people of Patlong" began to regret the choice that had been made, and turned towards the plaintiff.

This concluded the evidence. The court produced a lengthy judgment, finding in favour of Mitchell and wholly rejecting Mpiti's claim. The judgment opened with a full rehearsal of the facts, and of the evidence put in by both sides. It was accepted as common cause that Potlako was never Tautona's wife, and it was

stressed that the Sons of Sekake had rejected 'Mathabo's claim for her son Sekake III. The court gave rather sceptical attention to Goliath's evidence, and recalled his relationship to Mpho. It rejected what it read as his contention that a posthumously conceived child had no rights of succession while still retaining rights of inheritance. Having had the advantage of actually hearing Goliath, the court may well be correct in its reading, though, as has been noted, the record could rather more easily be taken as stating that in Goliath's view there was a crucial difference between the child of kenelo and less regular issue. But it certainly seems probable that Goliath, while wishing to keep his foot in the door of his claim to high rank in Basutoland, was reluctant to say anything that might be interpreted as a challenge to the throne.

Mpiti's argument that 'Mantoetse could not have been Tautona's wife since she was married for Potlako was neatly turned on its head when the court read 'Mantoetse's testimony as indicating that precisely because Potlako was not the wife of Tautona, she ('Mantoetse) could never have been married for her. This was thus the second time that Mpiti had been hoist with his own petard, the first being the occasion of his argument about 'Mathabo's chieftainship before the Paramount Chief's court in January 1955.

The main legal hurdle that confronted the court was the argument based upon the proviso to Laws of

Lerotholi (1946) section 2, which as noted before read as follows:

"If a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses".

But the line of argument adopted was (as in the Paramount Chief's Court) that nothing in the law stipulated that a posthumously conceived child could not assume his late pater's rights and duties. The words "dies without leaving male issue" were thus explicitly interpreted to exclude the case of kenelo. The court went on to repeat its rejection of Goliath's evidence on the law, and affirmed that "the law does not divide a man's rights into two; in declaring him a chief, it makes him an integral successor". This was in fact somewhat to distort as well as to overstate the point. Mpiti was not, naturally, arguing that Mitchell could be chief but must lose the inheritance, he was arguing that whatever happened to the inheritance (and as far as Mpiti was concerned, Mitchell could keep it) he should not be chief. Moreover, the law does recognise that chieftainship rights and property rights are separable for certain purposes (for example, a deposed chief, or a chief who loses part of his chieftainship rights as a result of a placing, does not lose any of his estate); and there had already been evidence in the case, and from the defendant's witnesses, that

Tautona's masimo a lira (chieftainship fields) had been differently disposed from his own "private" allocation during 'Mathabo's reign. But the court's point is nevertheless well taken, in that if Mitchell was Tautona's son by cattle he was his son in respect of chieftainship. Since, then, it accepted 'Mantoetse's marriage and Mitchell's legitimate if posthumous birth, it followed that it rejected Mpiti's claim in toto.

Six months later Mpiti formally lodged an appeal to the court of the Judicial Commissioner. His basic argument was based on the Laws of Lerotholi, but he added some further and often subtle (if highly debatable) points. He argued that by the time Mitchell was born, Thabo was long dead, so that Sekake II (Mpiti's father) was no longer regent to the then heir and could not pass on rights to 'Mantoetse's child. Thabo's premature death also explained why regency was not an issue between 'Mathabo and Sekake II: the chieftainess's reign did not interrupt the succession. (Mpiti was right about this, whatever may be said of the implications he deduced from it. A chieftainess in her own right reigns till her death, when the succession resumes its normal line. The real issue is one of "vesting". If the right vests unconditionally a morte of the (male) chief, then Sekake II passed his right on to Mpiti. If it is simply conditional vesting, then the successor is looked for a morte of the chieftainess, so that other things being

equal Mitchell would succeed; of course, Mpiti had the auxiliary claim that "other things" were not equal, since Mitchell was no son of Tautona, but that is another point. The third possibility is vesting subject to defeasance, viz., under a resolutive condition: the succession vested in Sekake II but passed away from him again on Mitchell's (presumed legitimate) birth. But Mpiti's strength lay in the point that an installed chief cannot lose his chieftainship by the subsequent birth of even a lawful son, and since 'Mathabo's reign does not interrupt the succession, the same right inheres in the male line to which the right will eventually pass on her death. This argument was countered by asserting that the actual installation of a chief brings a new factor into the situation; a chief cannot lose his right to another after he has once been installed, but this does not alter the case when he has not.) Mpiti was bold enough to bring out into the open the question of the Paramountcy, arguing that he was seeking to follow the law that gave Griffith the succession to Letsie II (see Chapter Two above). He went on to defend the view that one child could succeed to an estate and another to the chieftainship, arguing that in the absence of male issue the proviso to section two passed the succession to the junior house, though a posthumous child in a senior house could still eat the personal estate of the deceased in that house. Finally, he returned to the

point that had figured so strongly in the hearing, that the cattle taken out to marry 'Mantoetse were the fruit of fines taken out for Potlako's adultery and thus invalidated the alleged marriage.

The Judicial Commissioner's judgment can be very briefly considered. On 18th May 1959, Mr W.G.S. Driver upheld the special court's judgment, mainly on the grounds that "even though the kenela custom may be a decadent custom, it is still practised occasionally" and that in its terms Mitchell should succeed. (This remark on "decadent custom" is referred to in the excursus annexed to Chapter One: Custom and the Courts.) The judgment of the court below was upheld and the appeal dismissed.

It is at this point that the record stops, though Mpiti did not abandon his case, and prepared himself for an appeal to the High Court, and no doubt beyond.

Shortly after the Judicial Commissioner's hearing, Mpiti Sekake was returned as a Member of the Legislative Council for Qacha's Nek. At the time, elections to this body were indirect, being made by the District Councils, which were elected under general male suffrage. Nevertheless, this circumstance goes some way to validate Mpiti's claim to popular support. He was elected as a representative of the Basutoland Congress Party (B.C.P.), the most radical of the political parties in the territory. He subsequently broke away from the Congress in what he

claimed to be a "leftward" direction; but this assertion must be read in the light of the tortuous politics of African nationalist movements in southern Africa in the early and middle 1960's (see Halpern 1965; Hamnett 1966; Weisfelder 1969) and neither adds to nor detracts from the plausibility of his claim to popular support in Patlong.

This completes the historical narrative, but there are some features of the case as a whole that will repay further discussion.

The first concerns the interplay between somewhat abstract legal debate on the one hand and asseverations of "family" support on the other. The narrative itself has no doubt sufficiently revealed the sophistication of the first of these aspects of the story, particularly in the way in which the court, on two occasions, engaged in some intellectual fencing with Mpiti that is wholly typical of Sesotho debating skill. These passages of arms also reveal a delicate awareness of the two "moments" of juristic argument -- the enunciation of the "law" itself, and the determination of what this implies for the decision in hand. Some constructive and fruitful ambiguities are exploited here; thus, if Potlako is agreed not to have been married to Tautona, could 'Mantoetse have been married as a ngoetsi in Potlako's house? Obviously not, claims Mpiti; and argues that Mitchell is therefore not Tautona's son.

Obviously not, agrees 'Mantoetse; from which the court concludes that she was not married for Potlako but was a wife in her own right. The question of the cattle (which, it will be remembered, were not necessarily "cattle with hooves"), which formed a very important part of Mpiti's first case, clearly revealed that Tautona had (and the point was not really disputed) behaved both immorally and illegally not only in robbing Ntlama of his wife but also in depriving him of his damages (on one occasion probably in conscious collusion with Potlako). But the court was able to sidestep this issue, since it was never clearly ascertained whether Tautona was simply at fault in not compensating Ntlama (and here the moot point of whether cattle are fines or damages arises), or whether the cattle were not his at all. Where the cattle "without hooves" are in the form of cash, the ambivalence is profound enough to make it possible to evade a direct answer. It appears, indeed, from both positive and negative evidence not to be the case that bohali depends on the actual identity of particular beasts (still less on that of particular pound notes), though this question of identity may be evidentially important as a way of ascertaining who it was that paid the "cattle" and from which house they were taken out; it may be this that misled the Protestant missionary quoted by Leenhardt (Leenhardt 1939; contra all available evidence:

and a private communication from Revd G.M. Setiloane of 8th July 1969).

But the other side of the matter, which for reasons of exposition was not treated in any detail in the narrative, concerns the matter of "family" support. The general discussion of family councils in Chapters Two and Four shows that in matters of succession and inheritance, the most important criterion is that of the "family" council and the decisions at which it arrives. The "substantive rules" in Laws of Lerotholi and elsewhere however do not constitute an "objective law" to which recourse is had if a "private arrangement" cannot be agreed upon by the lelapa, so much as a set of customary principles which reflect and also inform the internal deliberations of the council. Three different elements can be analysed in this. First of all, there is the question of the "law" applicable; a case in point concerns the validity of woman- or grave-marriage, or of kenelo. Secondly, there is the question of fact, which consists in identifying the person of the heir; in most cases, though certainly not in all, this is a straightforward matter, but it is nevertheless up to the lelapa to come to a decision and present the heir, or heir and successor, of the deceased. Thirdly, however, there is the question which in Western courts would not be considered one of either law or fact (in the relevant sense), namely, whom it is that the lelapa

wish to advance or to put down. These are, of course, analytical aspects, and in the actual decision, it may be impossible, even pointless, to try to disentangle them. It is quite clear, for instance, that the greater part of the lelapa were opposed to 'Mathabo's attempted coup on behalf of Sekake III, but they objected rather on the grounds that there was already an available heir, in the person of Mitchell whom she could have adopted, than because the form of marriage between herself and Mpho was illegal. It is also quite clear, as the narrative has revealed, that many in the lelapa were hostile to Mpiti and produced reasons for considering him to be an unsuitable person to have as chief: in the years 1950-1955, he had been convicted on three charges (one of Stock Theft, one of Assault, and one of Forgery and Uttering); he lived in a beer-hall, and was married to a Griqua. The point is that had the family considered Mitchell to be unsuitable, and Mpiti to be a good candidate, there was sufficient ambiguity in the law to have enabled them to make the opposite choice, and to do so in a manner that legitimated their decision in legal terms. By this is meant not simply that they could show that they had a "discretion" in the matter -- making their decision an "act in the law" -- but rather that they could assert a direct legal authority for the specific choice of the emergent candidate -- an "act of the law" (Salmond 1947: 347 f.).

Nevertheless, the degree and nature of the support for each candidate is in itself a matter of great importance, and this is the second of the features of the case that deserves some expansion. Four particular levels of lineage depth emerge in the case, defined by reference to the Sons of Sehapa, the Sons of Sekake, the Sons of Makoe and the Sons of Mosothoane. Sehapa is the person designated as Sekake I on the accompanying genealogical diagram (fig. 1). He was the son of an earlier Sekake, who was the son of Makoe, who was the son of Mosothoane. The most important levels were the second, the Sons of Sekake, and the fourth, the Sons of Mosothoane. The reason for the relative unimportance of the Sons of Makoe is obscure, but two probable factors can be identified, one being the possible failure of some of Makoe's junior houses to continue through lack of issue, and the other being the (no doubt consequential) adoption of some of the Sons of Sekake into the original house of Makoe. Thus, Kali (a main witness for Mitchell) though, in order of families, from the sixth house of Sekake, described himself as Kali Makoe and conducted himself as a senior member of the Patlong chieftainship. He was acting chief after 'Mathabo's death, took a leading role in the meetings of the family, and was one of the four members of the family to hold a major headmanship in the ward

of Patlong (at Maboloka). The other major headmen in Patlong were (besides Mpiti himself at Thabana-Ts'ooana), first, Khanyetsi Malefane, headman of Thaba-Chitja, of Sekake's first house and son of Sehapa (Sekake I's) 's younger brother in that house, and secondly, Makoko Sehapa, heir of Sehapa's second house, who was headman at Qhoalinyane and was succeeded by his son Mopeli Makoko, also a figure in the dispute. These relationships are shown in fig. 2.

Mosothoane generated three houses, of which the first was the house of Makoe, the second the house of Phatela, and the third the house of Mpiti. Both these major segments figured prominently in the current dispute, it being notable that the successor of Phatela's first house was Mpiti's most powerful supporter. These relationships are shown in fig. 3. In the house of Phatela, Phalo is a major headman at Sekitsing ha Phalo, and Motloang at Sekitsing and Litsoeneng. These are both in the district of Mohale's Hoek, subject (directly) to the Principal Chief of Phamong. In the house of Mpiti Mosothoane, Sejanamane is a headman at Malimong, and his senior brother Lisebo was his senior chief at Pheellong, where he was followed by his widow 'Mants'ebo Seisa, both wards being in Qacha's Nek. The ward of Pheellong is directly subject to the Principal Chief.

The major decisions, sketched in the preceding narrative, were the work of the Sons of Mosothoane, or such of them as were present at the meetings. Questions of seniority arose, but were not definitively resolved. Kali declared that he had paid little attention to questions of seniority at the family meetings. This remark, which he repeated and insisted on, is significant of the ambiguities that perplexed the decision-making body at the various stages in the dispute. These ambiguities are developed, particularly in relation to the higher chieftainship, in Chapter Two, where they are conceptualised in terms of a "retrospective" and a "circumspective" principle of seniority reckoning (and see Hamnett 1965). In the present case, this takes the form of whether a relatively junior son of the house of Sekake is to be ranked senior to a senior son in the house of Phatela -- whether, for example, Kali Makoe or Malefane Sekake is senior to Phalo. At a lower level of segmentation, a similar ambiguity surrounds the ranking of Orpen Maseru to Malefane or Khanyetsi, of Malefane to Makoko, and of Makoko to Sekake II. Phalo declares his seniority by reading his position as heir to the senior house in the major lineage next in seniority to Makoe; Kali however (who partly bases his claim also on his years) has been promoted within the Sons of Sekake, who are the senior segment of the whole Mosothoane lineage.

Malefane, and his son Khanyetsi, come from the first house of Sekake Makoe, but Malefane was the junior son of that house; but precisely as junior son, he was full rangoane (father's brother) to Tautona, Sekake II and Makoko, and in that capacity a person of particular authority within the house of Sehapa after his elder brother's death. But Malefane's son is only a junior brother (patrilateral parallel cousin) to Makoko, and the latter, as head of Sehapa's second house, played (as did Mopeli) a leading role in the history of the case.

As has been observed, Kali was reluctant to commit himself on general questions of seniority (his own position being rather difficult to account for in terms of any one principle) and his reluctance was shared in various ways by other witnesses. There was a general tendency to stall or hedge when they were asked how many of the Sons of Mosothoane were present on any occasion, how many were considered to make up a satisfactory number, how the major segments aligned themselves in decision-making, and how seniority was defined.

One way of arriving at a general estimate of the constitution of the "family" starts from the assumption that when witnesses recite the names of persons who were present at a meeting or who took a part in a decision, they will recall and mention the most "important"

of the participants. Witnesses did in fact offer a list of names (from three to about fifteen), and usually added some such phrase as "and many others". It is true that some of the witnesses were old and their memories might have been failing, but nonetheless there is sufficient consistency in the names recited to suggest that any erratic performances cancelled each other out and that the principal actors were recalled quite faithfully. It must also be remembered that some people who were major figures in earlier stages of the dispute were dead in 1952 (particularly Sekake II), so that their "score" in terms of mentions is somewhat low. In other cases, however, a son or brother carried on in the place of an infirm or deceased man, and here the two voices speak as one. This was obviously not the case with Sekake II, whose son was of course the plaintiff. In addition to "mentions" by witnesses, a score can be recorded for Sons of Mosothoane who appeared as witnesses in the case, and for those that the various Basotho courts singled out as being seniors in the family. On this basis, some assessment can be reached.

If the "mentions" are summed (as defined: casual references and the mere repetition of a name in a single incident are excluded), they yield a total of one hundred and fifty-seven for the Sons of Mosothoane, the maximal lineage (Mpiti Sekake and Mitchell Tautona are

not counted, and nor are the wives of Tautona). Some difficulty is presented by the somewhat elusive Sons of Makoe, but if the Posholi group is tentatively assumed to belong to this segment, then one hundred and seventeen mentions are "scored". The Sons of Sekake have one hundred and five mentions, and the Sons of Sehapa have thirty-eight.

The detailed breakdown is as follows:

A. <u>Sons of Sehapa</u> (four persons)					<u>Total</u>	<u>Cumulative</u>
1st house	SEKAKE II			6		
2nd house	MAKOKO	7	}		22	
	MOPELI	15				
	SHAKHANE			10	38	38
B. <u>Sons of Sekake</u> (ten persons)						
1st house	SONS OF SEHAPA			38		
	MALEFANE	5	}		13	
	KHANYETSI	8				
2nd house	MASERU	3	}		6	
	ORPEN	3				
6th house	KALI	20	}		28	
	MOLAOLI	8				
9th house	NTEPE			8		
10th house	MATSEPE			6		
?	?			5		
?	?			1	67	105
C. <u>Sons of Makoe</u> (?) (four persons)						
1st house	SONS OF SEKAKE			105		
?	?			9		
	SEKAKE POSHOLI			1		
	PHALO POSHOLI			1		
	MATSEPE POSHOLI			1		
	MOSOTHOANE					
				1	12	117

			<u>Total</u>	<u>Cumulative</u>
D.	Sons of Mosothoane (five persons)			
	1st house	SONS OF MAKOA	117	
	2nd house	PHALO PHATELA	16	
		MPITI PHATELA	7	
		MOTLOANG PHATELA	10	
	? ?	MPOEA PHATELA	1	
	3rd house	SEJANAMANE		
		MPHAHAMA MPITI	6	40
				157

The Sons of Sehapa thus account for about a quarter of the mentions, the Sons of Sekake for about two-thirds, and those sons of Mosothoane who emerged from the junior (i.e., non-Makoe) houses for about a quarter. It is clear, therefore, that the Sons of Sekake constituted much the largest bloc, not only in terms of mentions but also of numbers of persons (fourteen out of twenty-three). Phalo Phatela, however, the head of Mosothoane's second house, is a clear exception to this, as is Motloang Phatela from Phatela's second house. Moreover, other sons of Mosothoane were not excluded (Sejanamane Mphahama Mpiti is mentioned a few times, and was a witness for the defendants, and other sons of Phatela are remembered and named by various witnesses on both sides). One particular advantage that attached to the Sons of Sekake was that they were so numerous. Sekake had eleven houses, only two of which failed to produce male issue. Moreover, they tended to have the advantage of living either on the spot or in the general area of Patlong.

In the case before the special court, the two "family" witnesses for the plaintiff were Mpiti himself and Phalo Phatela. The defendants called Mitchell, Kali, Molaoli (6th house of Sekake, junior to Kali), Matsepe (10th house of Sekake), Ntepe (9th house of Sekake), Motloang Phatela (junior to Phalo), Sejanamane (a junior in the house of Mpiti Mosothoane), and Mopeli Makoko, from Sehapa Sekake's second house. Mpiti claimed, on appeal, that the defendants' witnesses were all juniors. He chose to operate with a highly "retrospective" frame of reference, since this alone would enable the support that he derived from Phalo Phatela to be reckoned as sufficiently "senior", on its own, to avail against the seven family witnesses that have been mentioned as supporting his rival. But (at least from one point of view) Mpiti's whole case was "retrospective", in that it depended on the view that on Tautona's death, the line of succession should be found by going up to Sekake I and then down again, through Sekake II. Furthermore, Mpiti founded his case, for obvious reasons, upon an assertion of the strictness of the law governing chieftainship succession, as against the characteristically "circumspective" view that it is, up to a point, open to a chief to start the process of calculating seniority afresh and to take into account factors other than those of abstract right in selecting an incumbent to a chieftainship. Nevertheless, Mpiti was ready, of course, to derive what

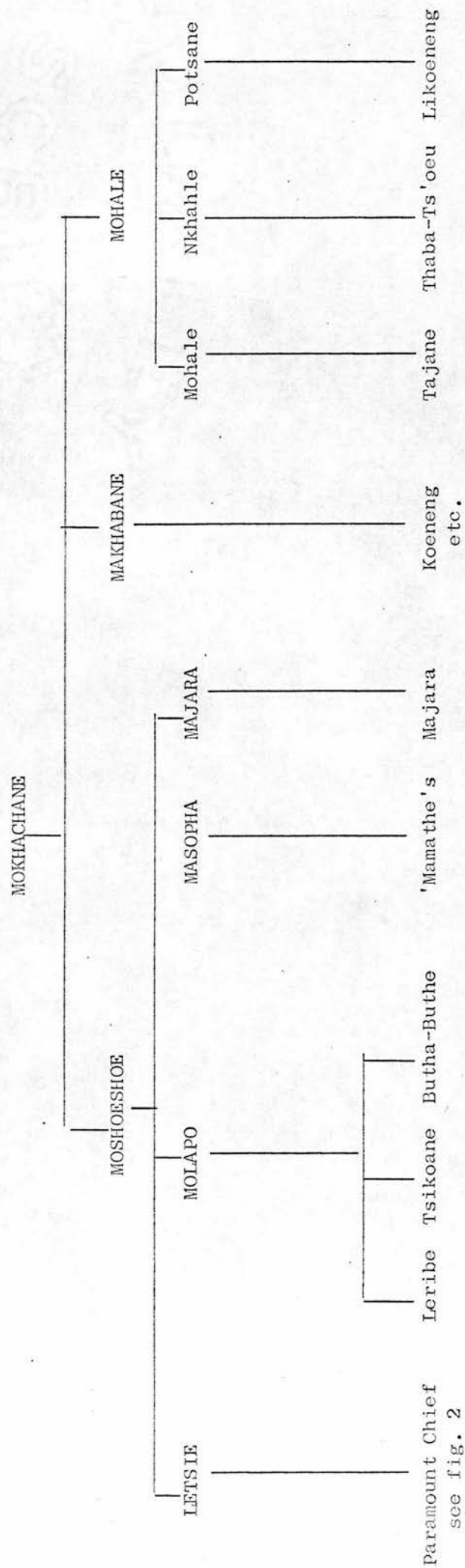
support he could from the alternative argument that the defendants' backing came from junior lines, albeit within the senior segment of the house.

The final aspect of the case to be considered is that of the headmanships within the ward of Patlong itself. It will be seen that (leaving aside the somewhat anomalous case of Kali's ward at Maboloka) the structure of the ward is contained in the first four houses at the lowest levels of fig. 1: Tautona/Mitchell, Sekake II/Mpiti, Makoko/Mopeli, and Malefane/Khanyetsi. The first and last of these are distributed, therefore, between the two sons of Sekake Makoe's first house, the second son being naturally subordinated to the first. The third of them represents the caretaking allocated to Sehapa's second house, and the second that allocated to Tautona's younger brother within Sehapa's first house. Thereafter, the succession has followed from father to son and will (most probably) so continue. This means that junior sons will be edged out of the chiefly system, if minor caretakings cannot be found for them within the existing wards; but this latter provision is possible only within certain limits, since once a "jurisdictional plenum" has been reached, one of two results must follow: either the new chief acts as his predecessor did, and "circumscriptively" advances his own immediate agnates (in which case the former incumbents, from parallel but in lineage terms now junior lines, are

extruded); or else (on the pattern of the "cardinal lines" deriving from Moshoeshoe) the pattern of lineage seniority once set up is left intact, in which case the immediate agnates of any given chief, with the exception of his heir, relapse into commoner status. Mitchell's younger brothers in the same house, in fact, emerged as very obscure figures in the story of this dispute. It has taken Patlong some time to reach this position, and it may not quite have come to the end of the road yet. This is due to the coincidence of two factors: the existence of a jurisdictional void in Qacha's Nek until the end of the last century, combined with the progressive settlement of the Orange River valley, on the southern edge of which Patlong lies. The significance of this lies in the fact that it is not only, or even so much, land area that sets a limit on jurisdiction as numbers of persons as potential subjects. While there is nothing to be gained in becoming "chief" of an uninhabited rock-face, on the other hand if settlement is dense, as in relative terms it is in the Orange Valley, many jurisdictions can be supported. But once even this limit has been reached, a former chiefly family will be left with only one installed successor. The junior sons may act as counsellors or as village liphala, but their junior sons will cease to be even that. Until recently, this process of progressive deterioration was accelerated by the placing system,

referred to in Chapters Two and Three, which had the effect of depressing all subordinate levels whenever a senior chief was placed. But even now that disruptive placings have virtually ceased, there is little room left for the continued expansion of chieftainship, and it remains to be seen how Lesotho and its chiefs will cope with the situation that results. It is clear, however, that chieftainship, in the form that it has taken in the twentieth century, was in terms of its structural processes an intrinsically transitional institution, well adapted for the purposes of expansion and the progressive settlement of unoccupied or conquered areas, but enmeshed in contradictions once such development had come to an end. The closure of the political frontiers in the last third of the nineteenth century walled up the only avenue of escape (Atmore 1969: 300 f.), though it was only with the passing of several generations that pressures built up sufficiently to precipitate the attempts of the colonial government to control the situation in 1938 (see Chapters Two and Seven). Such a situation as that of Patlong invites the possibility of an alternative, indigenous solution in the future.

APPENDIX THREE**Kinship and Affinity in the Higher Chieftainship**



The Genealogical Distribution of the Wards held by the Sons of Mokhachane

Fig. 1

Fig. 2

The Genealogical Distribution of the Principal Wards

held by the Sons of Letsie

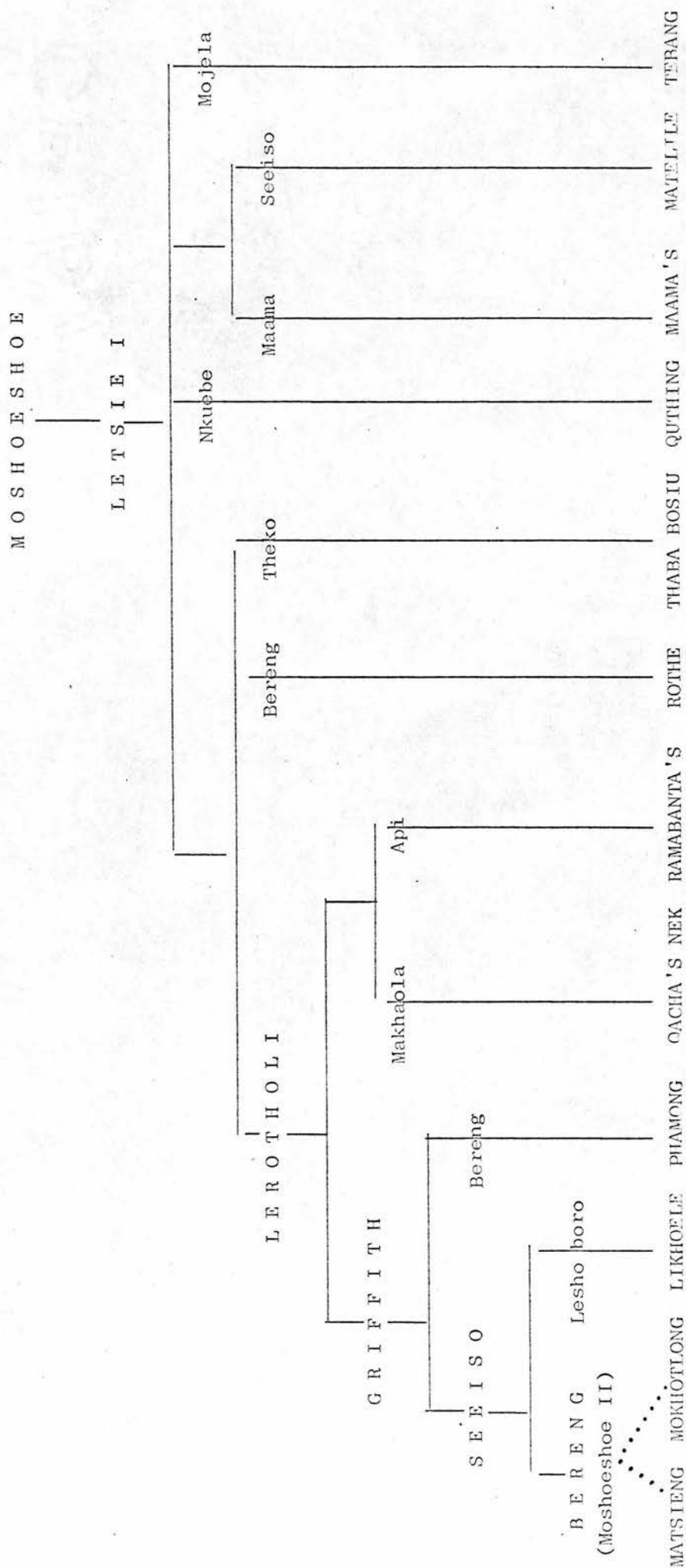
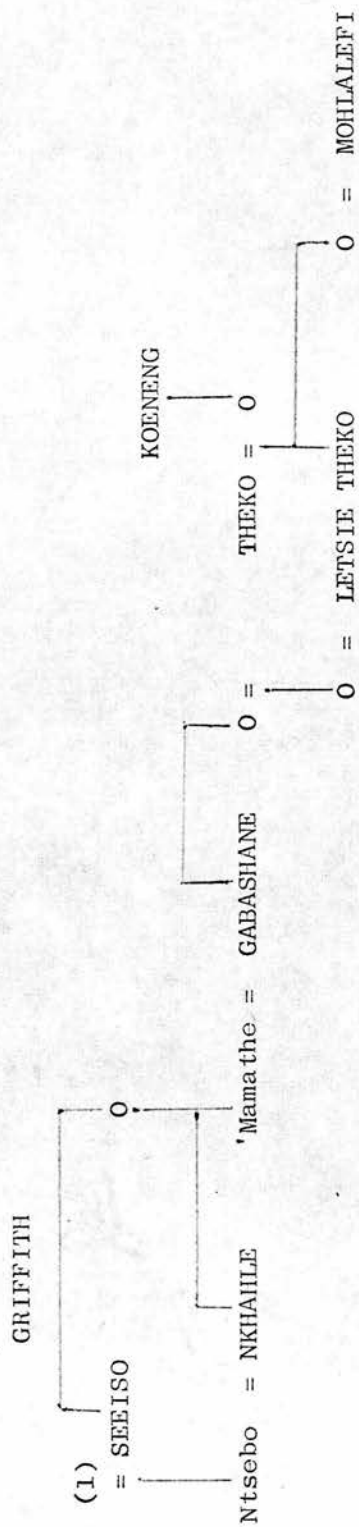


Fig. 3



Principal Chiefdoms are as follows:-

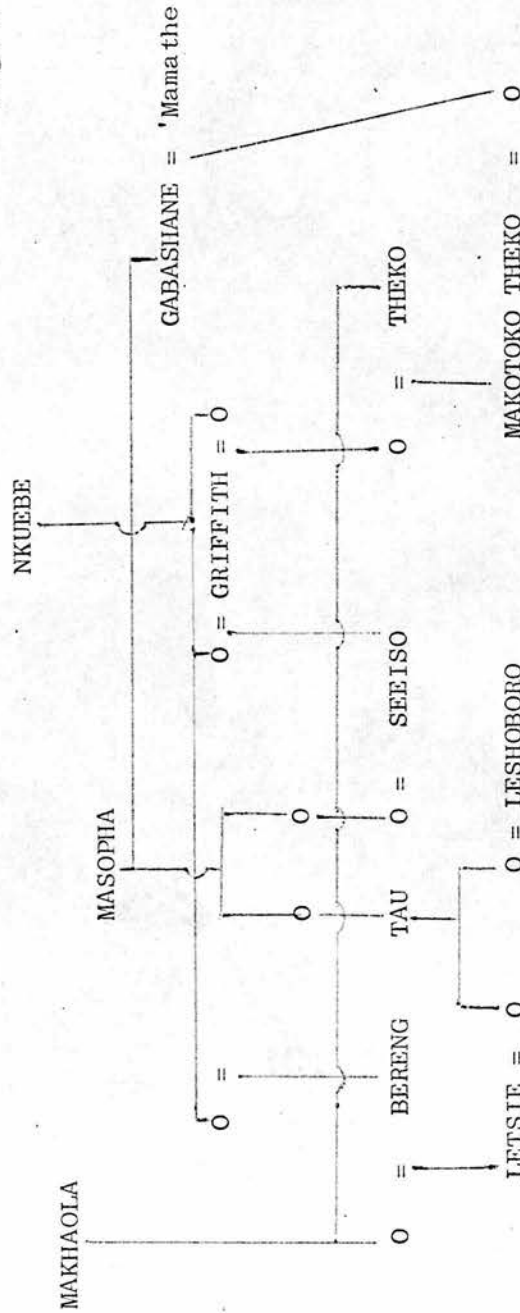
GRIFFITH, SEEISO Paramount Chiefs
 GABASHANE Masopha's ('Mamathe's')
 KOENENG Koeneng & Mapoteng
 (LETSIE) THEKO Thaba Bosiu
 MOHILAIEFI Rothe, Masite etc.

Note

NKHAILE (Nkhahle Phakiso Lebona) is Chief of the ward of Thaba-Ts'oeu. See fig. 1.

Fig. 5

Fig. 5



Principal Chiefdoms are as follows:-

GRIFFITH, SEEISO	Paramount Chiefs	BERENG, LETSIE	Phamong
MASOPHA	Masopha's ('Mama the's)	LESLOBORO	Likhoele

NKUEBE

Quthing

MAKHAOLA, (MAKOTOKO) THEKO

Qacha's Nek (Rats'oleli & Mashai)

GABASHIANE

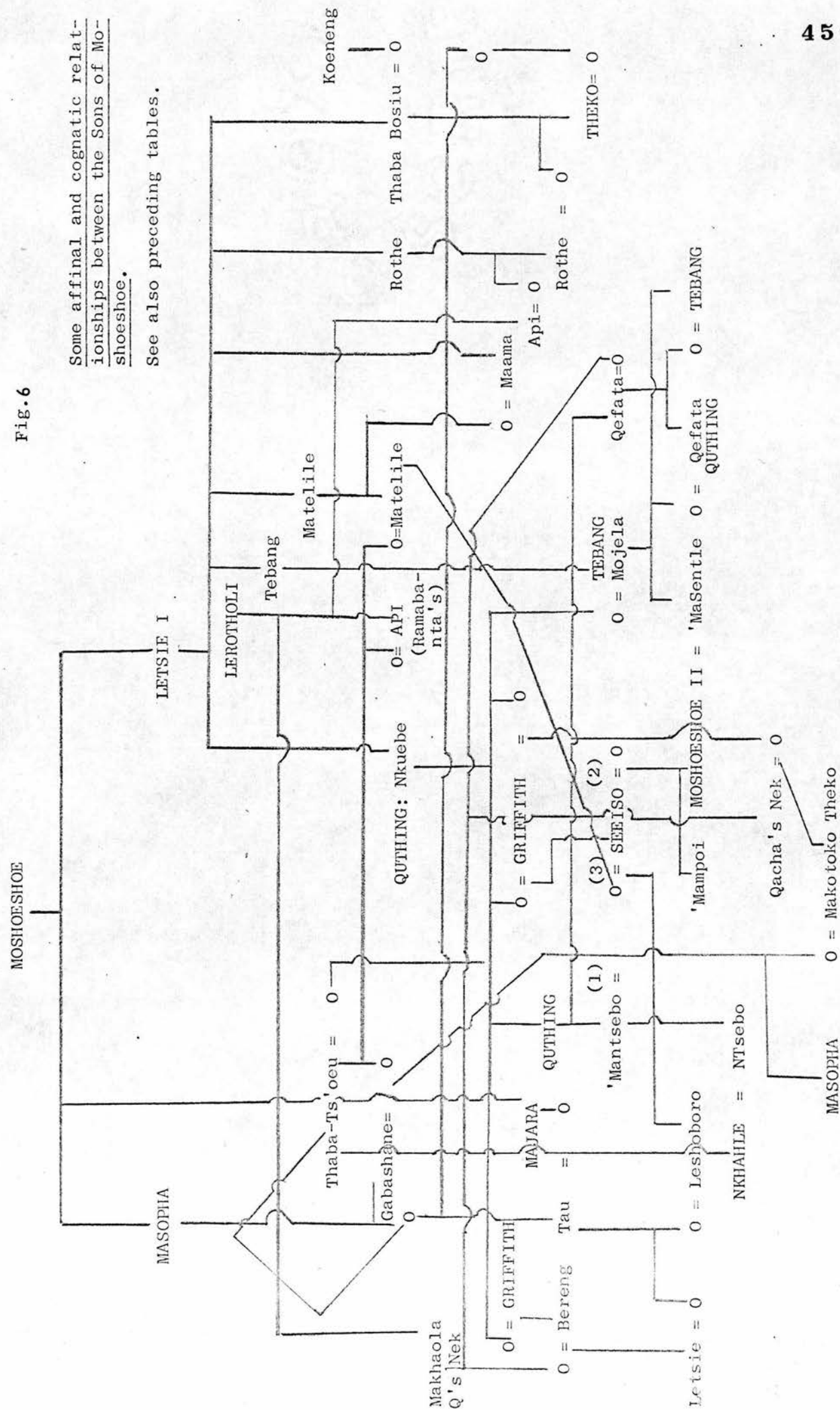
Masopha's ('Mama the's)

For TAU, see note to fig. 4

Fig. 6

Some affinal and cognatic relationships between the Sons of Mo-shoeshoe.

See also preceding tables.



REFERENCES

- ANON. 1928 A résumé of the causes which have led to the present condition of affairs in the Leribe district. MS, Basutoland Archives, Maseru (not published).
- ALLOTT, A.N. 1960 Essays in African Law (1st edition). London: Butterworths.
- do. (ed.) 1970 Judicial and Legal Systems in Africa London: Butterworths.
- ASHTON, E.H. 1938 Political organisation of the Southern Sotho. Bantu Studies 12, 4, pp. 287-320.
- do. 1946 The Social Structure of the Southern Sotho Ward. Cape Town University (Communications from the School of African Studies, n.s., 15).
- do. 1947 Democracy and indirect rule. Africa 17, pp. 235-251.
- do. 1967 The Basuto (2nd edition). London: Oxford University Press for International African Institute.
- ATMORE, A. 1969 The passing of Sotho independence. In THOMPSON 1969, pp. 282-301.
- BANTON, M. 1965a Roles. London: Tavistock Publications.
- do. (ed.) 1965b The Relevance of Models in Social Anthropology (A.S.A. Monographs No. 1) London: Tavistock Publications.
- BECKER, P. 1969 Hill of Destiny London: Longman.
- BLACKSTONE, W. 1783 Commentaries on the Laws of England (9th edition).
- BUTLER, S. 1872 Erewhon.
- CASALIS, E. 1930 Les Bassoutos. Paris: Société des Missions Evangéliques. (First published 1859.)
- DICEY, A.V. 1948 Introduction to the Study of the Law of the Constitution (9th edition, with an introduction and appendix by E.C.S. Wade). London: Macmillan. (First published 1885.)

- DOKE, C.M. 1954 The Southern Bantu Languages. London: Oxford University Press for International African Institute.
- DOKE, C.M. and MOFOKENG, S.M. 1957 Textbook of Southern Sotho Grammar. London and Cape Town: Longmans, Green.
- DUMONT, L. 1957 Hierarchy and marriage alliance in South Indian kinship. Occasional Papers of the Royal Anthropological Institute No. 12.
- DUNCAN, P.D. 1960 Sotho Laws and Customs. Cape Town: Oxford University Press.
- DURKHEIM, E. 1912 Les Formes Élémentaires de la Vie Religieuse Paris: F. Alcan.
- EISENSTADT, S.N. 1959 Primitive political systems: a preliminary comparative analysis. American Anthropologist 61, pp. 200-220.
- ELIAS, T.O. 1956 The Nature of African Customary Law. Manchester: Manchester University Press.
- ELLENBERGER, D.F. and MACGREGOR, J.C. 1912 History of the Basuto, Ancient and Modern. London: Caxton Publishing Co.
- ELLENBERGER, D.F. 1956 Historia Basotho. Morija: Morija Sesuto Book Depot.
- EVANS-PRITCHARD, E.E. 1940 The Nuer. Oxford: Clarendon Press.
- FORTES, M. 1959 Descent, filiation and affinity: a rejoinder to Dr Leach. Man 59, nos. 309 and 331.
- FRANK, J. 1949 Law and the Modern Mind. London: Stevens. (First published 1930.)
- FRIEDMAN, W. 1960 Legal Theory (4th edition). London: Stevens.
- GERMOND, R.C. (ed.) 1967 Chronicles of Basutoland. Morija: Morija Sesuto Book Depot.
- GIDDENS, A. 1968 "Power" in the recent writings of Talcott Parsons. Sociology 2, pp.257-272.
- GLUCKMAN, M. 1955 The Judicial Process among the Barotse of Northern Rhodesia. Manchester: Manchester University Press.
- do. 1965 The Ideas in Barotse Jurisprudence. New Haven and London: Yale University Press.
- do. (ed.) 1969 Ideas and Procedures in African Customary Law. London: Oxford University Press for International African Institute.

- GOODENOUGH, W. 1965 Rethinking "status" and "role."
In BANTON 1965b, pp. 1-24.
- GOODY, J. (ed.) 1966 Succession to High Office
(Cambridge Papers in Social Anthropology
No.4). Cambridge: Cambridge University
Press for the Department of Archaeology
and Anthropology.
- GUEST, A.G. (ed.) 1961 Oxford Essays in Jurisprudence. London: Oxford University Press.
- GULLIVER, P.H. 1963 Social Control in an African Society. London: Routledge and Kegan Paul.
- HAILEY, Lord 1953 Native Administration in the British African Territories Part V: The High Commission Territories. London: H.M.S.O.
- HALPERN, J. 1965 South Africa's Hostages. Harmondsworth: Penguin Books.
- HAMNETT, I. 1961 A lawyer's view of the natural law. Blackfriars 42, pp. 370-377.
- do. 1965 Koena chieftainship seniority in Basutoland. Africa 35, pp. 241-251.
- do. 1966a Lesotho dilemma. New African, April 1966.
- do. 1966b. The Maseru stockfell club: a multi-racial experiment in southern Africa. Race, 8, pp. 175-184.
- do. 1967a Review of ASHTON 1967 and STEVENS 1967. Race, 9, pp. 260-261.
- do. 1967b Ambiguity, classification and change: the function of riddles. Man, n.s., 2, pp. 379-393.
- HUGHES, A.J.B. 1964 Swazi Land Tenure. University of Natal, Institute for Social Research (unpublished draft prepared for publication).
- JONES, G.I. 1951 Basutoland Medicine Murder (Cmd. 8209). London: H.M.S.O.
- do. 1966 Chiefly succession in Basutoland. In GOODY 1966, pp. 57-81.
- KELSEN, H. 1934 The pure theory of law--its methods and fundamental concepts. Law Quarterly Review 50 (1934) pp.474 ff. and 51 (1935) pp. 517 ff.
- KUNENE, D.P. 1967 The Works of Thomas Mofolo: Summaries and Critiques. Occasional Paper No. 2, African Studies Center, University of California, Los Angeles.

- KUPER, H. 1947 An African Aristocracy. London: Oxford University Press for International African Institute.
- LAGDEN, G. 1909 The Basutos (two volumes). London: Hutchinson.
- LEACH, E.R. 1961 Rethinking Anthropology. London: Athlone Press (L.S.E. Monographs on Social Anthropology No.22).
- LEENHARDT, M. 1939 La notion de mariage au Basutoland. Bulletin des Missions 18, 1, pp. 99-104 (St-André-lez-Bruges, Belgium).
- LEGASSICK, M. 1969 The Sotho-Tswana peoples before 1800. In THOMPSON 1969, pp. 86-125.
- LEVI-STRAUSS, C. 1969 The Elementary Structures of Kinship (revised edition translated from the French under the editorship of Rodney Needham). London: Eyre and Spottiswoode.
- LOUCH, A.R. 1966 Explanation and Human Action. Oxford: Blackwell.
- LYE, W. 1969 The distribution of the Sotho peoples after the Difaqane. In THOMPSON 1969, pp. 191-206.
- MABILLE, A. and DIETERLEN, H. 1961 Southern Sotho-English Dictionary. Reclassified, revised and enlarged by R.A. Paroz. New edition using the 1959 Republic of South Africa orthography. Morija: Morija Sesuto Book Depot.
- MAINE, Sir H. 1950 Ancient Law. London: Oxford University Press. (First published 1861.)
- MAIR, L. 1962 Primitive Government. Harmondsworth: Penguin Books.
- MALINOWSKI, B. 1926 Crime and Custom in Savage Society London: Routledge and Kegan Paul.
- MARSHALL, G. 1961 Justiciability. In GUEST 1961, pp. 265-287.
- MILNER, G. 1970 From proverb to riddle and vice versa. Proverbium 15, pp. 84 (500) f.
- MOROJELE, C.M.H. 1962 (etc.) 1960 Agricultural Census Reports (eight parts). Maseru: Department of Agriculture.
- MOSHESH, N. 1880 A Little Light from Basutoland. Cape Town: privately published (J.M. Orpen ?)
- PAROZ, R.A. 1957 Elements of Southern Sotho (revised edition). Morija: Morija Sesuto Book Depot.
- PARSONS, T. 1939 The professions and social structure. Social Forces 17, pp. 457-467.

- PARSONS, T. 1954 Essays in Sociological Theory (revised edition). New York: Free Press of Glencoe.
- do. 1960 Structure and Process in Industrial Societies. New York: Free Press of Glencoe.
- PIM, Sir A. 1935 Financial and Economic Position of Basutoland (Cmd. 4907). London: H.M.S.O.
- PLUCKNETT, T.F.T. 1949 Legislation of Edward I. Oxford: Clarendon Press.
- POPPER, Sir K.R. 1962 The Open Society and its Enemies, volume one (4th edition). London: Routledge and Kegan Paul.
- POUND, R. 1923 The theory of judicial decision. Harvard Law Review 34, 35 and 36.
- RADCLIFFE-BROWN, A.R. 1952 Structure and Function in Primitive Society. London: Cohen and West.
- RAMOLEFE, A.M.R. n.d. The Restatement of Sesotho Customary Law: the Law of Marriage. Restatement of African Law Project, University of London (not published). Mimeo.
- do. 1969 Sesotho marriage, guardianship and the customary-law heir. In GLUCKMAN 1969 pp. 196-209.
- do. 1970 Lesotho. In ALLOTT 1970, pp.248-260, 311.
- SALMOND, Sir J. 1947 Jurisprudence (10th edition by Glanville L. Williams). London: Sweet and Maxwell.
- SAWER, W. 1965 Law in Society. Oxford: Clarendon Press.
- SCHAPERA, I. 1955 A Handbook of Tswana Law and Custom (2nd edition). London: Oxford University Press for International African Institute.
- do. 1965 Contract in Tswana case law. Journal of African Law 9, pp.142-153.
- SEKESE, A. 1962 Mekgwa le maele a Basotho. Morija: Morija Sesuto Book Depot.
- SHAPIRO, D.L. 1965 The choice of rule making or adjudication in the development of administrative policy. Harvard Law Review 78, pp. 921 ff.
- SHEDDICK, V.G.J. 1953 The Southern Sotho. London: International African Institute (Ethnographic Survey of Africa, Southern Africa, Part II).
- do. 1954 Land Tenure in Basutoland. London: H.M.S.O. (Colonial Research Studies No. 13).

- SMITH, M.G. 1956 On segmentary lineage systems. J.R. Anthropol. Inst. 86, pp. 37-80
- do. 1960 Government in Zazzau 1800-1950. London: Oxford University Press for International African Institute.
- SPENCE, J.E. 1968 Lesotho: the Politics of Dependence. London: Oxford University Press for Institute of Race Relations.
- STEVENS, R.P. 1967 Lesotho, Botswana and Swaziland. London: Pall Mall Press.
- STONE, J. 1964 Legal System and Lawyers' Reasonings. London: Stevens.
- do. 1966 Law and the Social Sciences in the Second Half Century. Minneapolis: University of Minnesota Press.
- THOMPSON, L. (ed.) 1969 African Societies in Southern Africa. London: Heinemann.
- TYLDEN, G. 1950 The Rise of the Basuto. Cape Town and Johannesburg: Juta and Co.
- VANDERLINDEN, J. 1966 'A propos de quelques ouvrages récents de droit africain. Africa 36, pp. 359-372.
- do. 1969 Réflexions sur l'existence du concept de propriété immobilière individuelle dans les droits africains traditionnels. In GLUCKMAN 1969 pp. 236-251.
- WADE, E.C.S. 1961 Administrative Law. Oxford: Clarendon Press.
- WALLMAN, S. 1965 The communication of measurement in Basutoland. Human Organisation 24, 3.
- do. 1969 Take Out Hunger. London: Athlone Press (L.S.E. Monographs in Social Anthropology No. 39).
- WEBER, M. 1947 The Theory of Social and Economic Organisation. (English translation by A.R. Henderson and T. Parsons.) New York: Oxford University Press.
- do. 1954 Max Weber on Law in Economy and Society. (Edited by M. Rheinstein.) Cambridge, Mass.: Harvard University Press.
- WEISFELDER, R.F. 1969 Defining National Purpose in Lesotho. Athens, Ohio: Ohio University Center for International Studies (Papers in International Studies, Africa Series, No. 3).
- WILSON, M. and THOMPSON, L. (ed.s) 1969 The Oxford History of South Africa, Volume One, South Africa to 1870. Oxford: Clarendon Press.

- WILSON, N. 1965 The Sociology of a Profession: the Faculty of Advocates. Ph.D. thesis, University of Edinburgh.
- WINCH, P. 1958 The Idea of a Social Science. London: Routledge and Kegan Paul.

Government Publications and Official Reports, etc.

(See also above Hailey 1953, Jones 1951, Morojele 1962, Pim 1935, Sheddick 1954.)

Official Gazette of the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland.

Basutoland Government Gazette.

Report and Evidence of the Commission on Native Laws and Customs. Cape Town, 1873.

Basutoland National Treasury Explanatory Memorandum, 1944.

Report of the Administrative Reforms Committee 1954 (Moore Report).

Basutoland 1956 Population Census.

Report on Constitutional Reform and Chieftainship Affairs (Tlaleho ea Ntlafatso ea Motheo oa Puso le Litaba tsa Borena). Maseru, 1958.

Melao ea Lerotholi (e hlophisitsoeng) 1959. Morija: Morija Sesuto Book Depot.

Report of an Economic Survey Mission: Basutoland, Bechuanaland Protectorate and Swaziland, 1960. London: H.M.S.O.

Basutoland Constitutional Handbook 1960.

Report of the Basutoland Constitutional Commission (Tlaleho ea K'homishene ea Molao oa Motheo oa Lesotho) 1963. Maseru.

Basutoland Order 1965.